TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 474

THE PEOPLE OF THE STATE OF ILLINOIS *EX REL.* CHARLES H. GERSCH, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO, FRED A. BUSSE, AS MAYOR OF SAID CITY; LEROY T. STEWARD, AS SUPERINTENDENT OF POLICE OF SAID CITY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED NOVEMBER 29, 1911.

(22,947.)

(22,947.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 871.

THE PEOPLE OF THE STATE OF ILLINOIS *EX REL.* CHARLES H. GERSCH, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO, FRED A. BUSSE, AS MAYOR OF SAID CITY; LEROY T. STEWARD, AS SUPERINTENDENT OF POLICE OF SAID CITY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1911.

1 At a Supreme Court, begun and held at Springfield on Tuesday, the Fourth day of April, in the year of our Lord One Thousand Nine Hundred and Eleven, within and for the State of Illinois.

Present:

The Honorable Alonzo K. Vickers, Chief Justice;
Honorable James H. Cartwright, Justice;
Honorable John P. Hand, Justice;
Honorable William M. Farmer, Justice;
Honorable Orrin N. Carter, Justice;
Honorable Frank K. Dunn, Justice;
Honorable George A. Cooke, Justice;
William H. Stead, Attorney General;
Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered to-wit on the 13th day of March, A. D. 1911, the same being one of the days in vacation before the term of Court aforesaid a record of the proceedings in the Superior Court of Cook County was filed by People of the State of Illinois ex rel. Charles H. Gersch in the office of the Clerk of the Supreme Court in words and figures following to-wit:

2 7656. Ag. 39.

Record from Superior Court of Cook County to Illinois Supreme Court.

Gen. No. 284,747.

PEOPLE OF THE STATE OF ILLINOIS ex Rel. CHARLES H. GERSCH
vs.
CITY OF CHICAGO, FRED A. BUSSE, as Mayor, et al.

Filed Mar. 13, 1911. J. McCan Davis, Clerk of Supreme Court.

3 UNITED STATES OF AMERICA,
State of Illinois,
County of Cook, ss:

Pleas before the Honorable Charles A. McDonald, one of the Judges of the Superior Court of Cook County, in the State of Illinois, holding a branch Court of said Court, at a regular term of said Superior Court of Cook County, begun and holden at the Court-house in the City of Chicago, in said County and State, on the first Monday, being the sixth day of February, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

Present:

The Honorable Charles A. McDonald, Judge of the Superior Court of Cook County;
John E. W. Wayman, State's Attorney;
Michael Zimmer, Sheriff of Cook County.

Attest:

CHARLES W. VAIL, *Clerk.*

Be it remembered that heretofore, to-wit on the 15th day of February, A. D. 1911, a certain Petition was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

4 STATE OF ILLINOIS,
County of Cook, ss:

Petition for Mandamus.

In the Superior Court of Cook County.

CHARLES H. GERSCH, Petitioner,
vs.
CITY OF CHICAGO, FRED A. BUSSE, Mayor of said City; LE ROY T. Steward, Superintendent of Police of said City; M. R. Lower Zina R. Carter, and M. L. McKinley, Civil Service Commissioners of said City.

Now comes Charles H. Gersch, your petitioner, of the City of Chicago, in the County of Cook and State of Illinois, by his attorney, A. B. Chilcoat, and represents and states to this court as follows:

That on, to-wit, the 13th day of February, 1863, the People of the State of Illinois, represented in the General Assembly, duly passed an act to reduce the charter of the City of Chicago, and the several acts amendatory thereof into one act, and revised the same. That by different sections of Chapter X of said act provisions were made as follows, to-wit:

"SECTION 1. There is hereby established an executive department of the municipal government of said city to be known as the board

of police. Said board shall consist of three commissioners, in addition to the mayor, who shall be ex officio a member thereof, to be chosen in the manner hereinbefore prescribed; and a majority of said board shall constitute a quorum for the transaction of business. * * *

"SECTION 4. Said board shall assume and exercise the entire control of the police force of said city, and shall possess full power and authority over the police organization, government, appointments and discipline within said city. * * *

"SECTION 6. The duties of the police force shall be executed under the direction and control of said board, and according to rules
5 and regulations which it is hereby authorized to pass from time to time, for the more proper government and discipline of its subordinate officers and the police force of the city. The said police force shall consist of a superintendent of police, three captains of police, six sergeants, ninety police patrolmen, and as many more police patrolmen as may be authorized by the common council on application by this board. The several offices hereby created shall be severally filled by appointments in the mode prescribed by this act. And each person so appointed shall hold office only during such time as he shall faithfully observe and execute all the rules and regulations of said board, the laws of the state, and the ordinances of the city. * * *

"SECTION 7. The qualifications, enumeration and distribution of duties, mode of trial and removal from office, of each officer of said police force, shall be particularly defined and prescribed by rules and regulations of the board of police; Provided, however, that no person shall be appointed to or hold the office of superintendent of police without the advice and consent of the common council to every such appointment; nor shall any person be appointed to or hold office in the police force aforesaid, who is not a citizen of the United States, or who shall not have resided within the State of Illinois two years next proceeding his appointment, or who shall ever have been convicted of crime: And, Provided, that no person shall be removed therefrom except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense; but the board of police shall have power to suspend any member of the police department of the city pending and hearing of the charges preferred against him: And, Provided, that when any vacancy shall occur in the force of captain of police, the same shall be filled by appointment from among the persons then in office of sergeant of police shall be filled by appointment from among the persons then in office as police patrolmen."

6 Said police force so continued until the aforesaid act was amended by the legislature of the State of Illinois, February 16, 1865, when the foregoing sections, six and seven, were repealed, and sections 15, 16 and 19 of the Act of 1865, were passed. The said sections read as follows:

"SECTION 15. The duties of the police force shall be executed under the direction and control of said board, and according to rules

and regulations which it is hereby authorized to pass, from time to time, for the more proper government and discipline of its subordinate officers and the police force of said city. The said force shall consist of a general superintendent of police, one deputy superintendent of police, three captains of police, sergeants of police not exceeding twelve, and as many more police patrolmen, not exceeding two hundred, as may be authorized by the common council on the application of the board of police commissioners, and each patrolman so appointed, shall hold his office only during such time as he shall faithfully observe and execute all the rules and regulations of said board, the laws of the state, and the ordinances of the city; Provided, that for incompetency, neglect of duty, or other sufficient cause, the said board may, at any time, remove the superintendent and deputy superintendent of police, or the fire marshal and assistant fire marshal.

"SECTION 16. The qualification, enumeration and distribution of duties, mode of trial and removal from office of each officer of said police force, shall be particularly defined and prescribed by rules and regulations of the board of police; nor shall any person be appointed to or hold office in the police force aforesaid, who is not a citizen of the United States, or who shall not have resided within the State of Illinois two years next preceding his appointment, or who shall ever have been convicted of crime: And, Provided, that
7 no person shall be removed therefrom, except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense; but the board of police shall have power to suspend any member of the police department of the city, pending the hearing of the charges preferred against him; And, Provided, that whenever any vacancy shall occur in the office of captain of police, the same shall be filled by an appointment from among the persons then in office as sergeants of police; and a like vacancy in the office of sergeant of police shall be filled by appointment from among person then in office as police patrolmen.

"SECTION 19. From and after the passage of this act the mayor of said city shall cease to be in any manner member of the board of police and of the board of public works of said city."

That afterwards, to-wit, on the 3rd day of May, 1867, the Common council of the City of Chicago duly passed an ordinance of said city, which ordinance took effect and was in force from and after its passage. Said ordinance appears in the Proceedings of the Common Council of the City of Chicago, for the year 1867, at page 356 thereof, and reads as follows:

"An ordinance authorizing an increase of the Police Force."

"Be it ordained by the Common Council of the City of Chicago, that the Board of Police be, and they are hereby authorized to appoint fifty additional police patrolmen, making the whole force to consist of two hundred and fifty for the fiscal year 1867, exclusive of the officers. This ordinance shall take effect and be in force from and after its passage."

That thereafter, to-wit, on the 23rd day of August, 1869, the

Common Council of the City of Chicago duly passed an ordinance of said city increasing the Police Force by adding to said force Seventy-five men. Said ordinance is found in the Proceedings of the Common Council of the City of Chicago for the year 1869, at page 705 thereof, and reads as follows:

8 "Be it ordained by the Common Council of the City of Chicago.

"SECTION 1. That the Board of Police of said city be and they are hereby authorized to increase the police thereof by the appointment of not to exceed three sergeants, and not to exceed Seventy-five additional patrolmen.

"SECTION 2. This ordinance shall be in force from and after its passage."

That thereafter, to-wit, on the 18th day of November, 1872, the Common Council of the City of Chicago duly passed an ordinance of said city increasing the police force by the appointment of Seventy-five additional patrolmen. Said ordinance is found in the Proceedings of the Common Council of the City of Chicago for the year 1872, at page 586 thereof, and reads as follows:

"An ordinance authorizing the purchase of fire extinguishers, and increase of police force, etc.

"Be it ordained by the Common Council of the City of Chicago.

"SECTION 3. That the said Board of Police be, and the same are hereby authorized to increase the police force by the appointment of 75 additional police patrolmen at a salary or pay of $60. per month to each of such additional patrolmen as may be necessary, or as may be from time to time ordered by the Common Council to act as fire warden, but no additional pay shall be allowed to any police patrolmen so detailed as fire warden.

Said ordinance were in force in said City of Chicago at the time of the adoption of said General Act for the Incorporation of Cities and Villages by said city; and, by Section 11 of said General Act all ordinances, resolutions and by-laws in force in said City of Chicago, when organized under said Act, were thereby continued in force. Said Section 11 reads as follows:

9 "All ordinances, resolutions and by-laws in force in any city or town when it shall organize under this Act, shall continue in full force and effect until repealed or amended, notwithstanding such change of organization; and the making of such change of organization shall not be construed to effect a change in the legal identity, as a corporation, of such city or town."

The said Police Force, of said City of Chicago, continued under the control of the Board of Police aforesaid until, to-wit, the adoption, by the legal voters of said City of Chicago, of the General Act to provide for the Incorporation of Cities and Villages. Said General Act was passed by the legislature of the State of Illinois, Approved April 10, 1872, in force July 1, 1872, and was adopted by said City of Chicago, April 23, 1875.

"SECTION 6. All courts in this state shall take judicial notice of the existence of all villages and cities organized under this act, and of the changes of the organization under this act; and from the time

of such organization or change of organization the provisions of this act shall be applicable to such cities and villages, and all laws in conflict therewith shall no longer be applicable. But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place."

That by Section 1 of Article V of said act it was, amongst other things, provided as follows:

"* * * The city council in cities and the president and board of trustees in villages shall have the following powers: * * *

"Sixty-six. To regulate the police of the city or village and pass and enforce all necessary police ordinances. * * *

"Sixty-eight. To prescribe the duties and powers of a superintendent of police, policemen and watchmen."

That afterwards, to-wit, on the 28th day of June, 1875, the city council of the City of Chicago duly passed an ordinance approved by the mayor, for the reorganization of the police department of the city. The ordinance contained seventeen sections, and those deemed material, in this cause, are as follows:

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"Be it ordained by the city council of the City of Chicago:

"SECTION 1. There is hereby established and created a department of the municipal government of said city, to be known as the department of police. * * *

"SECTION 2. There is hereby created the office of city marshal of said city. The term of said office shall be for the term of two years commencing with July 1st, 1875, and the salary attached to said office shall be $4,000 per annum. The city marshal shall be appointed by the head of the police department, and shall give a bond with security to be approved by the mayor, in the sum of $25,000, conditioned for the faithful performance of the duties of the office, and shall well and truly account for and pay over all moneys, and surrender any and all property, books and papers which may come into his hands as said city marshal, on the expiration or sooner termination of his term of office. He shall, as such head of the police department (subject to all the general ordinances of the city), assume and exercise the control of the police force of the city, and shall possess full power and authority, subject to all the general ordinances of the city council, over the police organization, government, appointments, and discipline within said city, and shall have the custody and control, subject to the direction of the comptroller, of the public property, books, records and equipments belonging to the police department. * * *

"SECTION 5. The said force shall consist of one general superintendent of police, one deputy superintendent of police, four captains of police, twenty sergeants, and the police patrolmen now in the employ of the city, which may be increased or decreased in number from time to time, or any police patrolman may at any time be removed and discharged from the police force by the superintendent of the force, with the concurrence of the city marshal; The deputy superintendent and sergeants may be removed and discharged or reduced in rank by the city marshal, with the

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written concurrence of the mayor of the city; provided, however, that the office of deputy superintendent shall be discontinued and cease to exist after the present fiscal year. All the members of the police force shall take an oath to faithfully discharge their duties. * * *

"SECTION 17. The police force as heretofore existing, shall continue to be the police force until otherwise changed by this ordinance, but the board of police, and the office theretofore known as that of the commissioner of the board of police of the City of Chicago, shall cease to exist, and no duties shall hereafter be performed or power or authority exercised in connection with said police force by said board or any commissioner of the board of police of said city, after the passage of this ordinance."

That afterwards, to-wit, on the 13th day of April, 1881, the city council of the City of Chicago duly passed an ordinance of said city, which ordinance was approved on the 18th day of April, 1881. Said ordinance appears in the municipal code of Chicago, published by authority of the city council in the year 1881, Chapter VIII. Said ordinance, among other things, provided as follows, to-wit:

"730. There is hereby established an executive department of the municipal government of the City of Chicago, which shall be known as the department of police, and shall embrace the superintendent of police, a secretary to said superintendent, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been or may be prescribed by ordinance.

"731. There is hereby created the office of superintendant
12 of police, who shall be the head of said department of police, and shall hold his office for the term of two years, and until his successor shall be appointed and qualified. * * *

"734. The superintendent shall have the management and control of all matters relating to the department, its officers and members; and, with the consent of the mayor, he shall appoint all officers and members of said department: provided, that all captains shall be appointed from members of the police serving as lieutenants, all lieutenants from members of the police serving as sergeants, and all sergeants from members serving as patrolmen.

"735. Said superintendent shall have the power to remove from the police force any police patrolman at his pleasure, and, with the concurrence of the mayor, he may remove, or reduce in rank any officer or member of said department. * * *

"750. The superintendent shall hear and determine all cases for a violation of any rule, regulation or order of said department, or other breach of discipline, and shall have power to punish the offending party by reprimand, forfeiture, and withholding pay for a specified time, or dismissal from the force; but no more than ten days' pay shall be forfeited and withheld for any offense.

"751. The superintendent of police may perfer written charges, without oath, for any violation of the police rules, regulations or orders, against any police officer or patrolman upon the regular

police force, upon his own knowledge, or upon written information communicated to him by any member of the police department.

"752. During the pending of charges against any police officer or patrolman upon the police force, the superintendent may suspend from duty any such officer or patrolman until such charges can be examined."

Your petitioner states that he is advised, and avers the facts to be, that said Sections 735 and 750 were upon the passage of said ordinance, void; and were and are of no force or effect, for
13 the reason that the provisions thereof are directly at variance with the provisions of the statute of the State of Illinois, pertaining to the removal of police patrolmen from the police force of said City of Chicago.

That the aforesaid provisions of said ordinance, so far as the same were valid, continued in force until the adoption by the legal voters of said City of Chicago, as hereinafter stated, of an act of the legislature of the State of Illinois, entitled, "An Act to regulate the Civil Service of Cities," on to-wit, the 25th day of March, 1895, and until, to-wit, the first day of July, 1895, when the then mayor of said City of Chicago, by his proclamation, declared the said act to be thereafter in full force and effect in said City of Chicago, as hereinafter stated.

Your petitioner further shows that at the municipal election in the City of Chicago, held in, to-wit, the month of April, 1875, H. D. Colvin, was elected Mayor of said City of Chicago, and having duly qualified, entered upon the duties of such office and became in law and in fact the mayor of said City of Chicago, and so continued to be such mayor, and acted as such for, to-wit, two years thereafter. That on, to-wit, April 23, 1875, an election was held in the City of Chicago, under the provisions of the general act to provide for the incorporation of Cities and Villages, approved April 10, 1872, with a view to incorporation under that act. The votes being canvassed by the common council of said city, a majority was declared in favor of such incorporation. Assuming to act under such incorporation and the provisions of said act, the City Council, June 28, 1875, passed an ordinance, approved by the mayor, for the reorganization of the police department of the City of Chicago. By said ordinance there was created the office of City Marshal of said City. The term of said office being for two years, commencing with July 1,
14 1875. The said office to be filled by appointment of the mayor, with the approval of the City Council. Said City Marshal to be the head of the police department; and as such head of said department, to assume and exercise the control of the police of said city, over the police organization, government, appointments and discipline within said city.

That thereafter, to-wit, on the 26th day of December, 1875, R. E. Godell, was appointed City Marshal, took the oath of office, entered upon the duties of said City Marshal, and so continued in the discharge of the duties of said city marshal until, to-wit, the 22nd day of May, 1876, when the office of said city marshal was abolished by the city council of the City of Chicago. That on, to-wit, July 24,

1876, an ordinance was duly passed by the city council of the City of Chicago, conferring the duties of said city marshal upon the General Superintendent of the Police Force of said city. The part of said ordinance applicable in this case reads as follows, to-wit:

"Be it ordained by the City Council of the City of Chicago:

"SECTION 1. That the duties of the city marshal, as prescribed by existing ordinances, shall be discharged by the Superintendent of Police; and whenever in such ordinances it is provided that the concurrence of the city marshal shall be necessary to the performance of any act, the action of the Superintendent of Police shall be sufficient.

"SECTION 2. That act shall be in force and take effect after its passage."

Your petitioner further shows that on, to-wit, October 4, 1875, M. C. Hickey was confirmed as General Superintendent of the Police force of said City of Chicago, by the City Council of said city, and thereafter took the oath of said office and entered upon the duties thereof.

That thereafter, to-wit, on the 17th day of August, 1876,
15 your petitioner, Charles H. Gersch, was duly appointed to the office of police patrolman in the department of police in said City of Chicago, by the then General Superintendent of Police of said city; which appointment your petitioner then and there accepted, and took and subscribed the following oath of office, to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

I, Charles H. Gersch, having been duly appointed to the office of police patrolman, do solemnly swear that I will support the Constitution of the State of Illinois, and that I will faithfully discharge the duties of such police patrolman according to the best of my ability.

CHARLES H. GERSCH.

Subscribed and sworn to before me this 17th day of August, 1876.

____ ____,
Notary Public.

And thereupon immediately after taking such an oath of office he entered upon the performance of his duties as such police patrolman, and continued thereafter in the discharge thereof until his further performance of such duties was wrongfully and illegally interrupted, as hereinafter stated and set forth.

And your petitioner avers that the office of police patrolman to which petitioner was appointed as aforesaid, was an office created by the said Act of the Legislature, passed February 13, 1863, and first above referred to, and by the amendments thereto passed by said legislature February 16, 1865, and secondly above referred to; which said two acts, so far as the provisions thereof created the

office of police patrolman in and for said City of Chicago, continued in full force and effect as valid and existing laws of said state, at the time of your petitioner's appointment to said office as aforesaid; and that, in so far as said acts of said legislature

16 created the office of police patrolman, they have never been repealed, but are still in force and effect. And your petitioner avers that he, in accepting such appointment to such office of police patrolman, and rendering service as aforesaid, relied upon said Acts of 1863 and 1865 as having created said office of police patrolman; and petitioner now insists that said office, to which he was appointed, was in fact created by said acts; and that said acts are a full justification for the claim of your petitioner which he now makes, to-wit, that upon said appointment and taking of the oath of office as aforesaid, he then and there held the office of police patrolman, which had been created under said statutes of 1863 and revised 1865, and that he could only be removed from said office by proceedings in conformity with the provisions of said acts or amendments thereto; and that no such removal was ever attempted, as is hereinafter shown.

That your petitioner then and there became a police patrolman of said City of Chicago, and in the service of said city as such. That during all of the period of time between the 17th day of August, 1876, and said 1st day of July, 1893, your petitioner was not only a police patrolman of said City of Chicago, with the consent of the then mayor of said City of Chicago, and continued in office as aforesaid, but he was, during all of said period, recognized as being such police patrolman by the respective mayors of said City of Chicago and the respective superintendents of police of said City of Chicago, and by the city council of said City of Chicago; and that no successor to your petitioner as such police patrolman was at any time during said period appointed; and said City of Chicago, during all of said period of years, duly appropriated the money to pay the salary accruing to your petitioner as such police patrolman; and such salary was paid to your petitioner as such police patrolman, from time to time, to-wit, from the month of August, 1876, up to and including the 1st day of July, 1893.

17 Your petitioner further shows that on, to-wit, the 1st day of July, 1893, he was promoted to the office of police patrol-sergeant in said police force of said City of Chicago, at a monthly salary of $100.00 per month, and entered upon the discharge of the duties of said office; and continued to discharge the duties of said office until, to-wit, the 1st day of June, 1895, when he was again promoted to the office of police desk sergeant, and entered upon the discharge of the duties of said office, and continued in the discharge of the duties of said office.

Your petitioner further shows that an Act duly passed by the Legislature of the State of Illinois, entitled "An Act to regulate the Civil Service of Cities," approved and in force March 20th, 1895, was, pursuant to the provisions of the law, submitted to the legal voters of the City of Chicago, for their adoption, at a general election held in the City of Chicago, on, to-wit, April 2nd, 1895. That at

said election said act was adopted by the legal voters of said city; and thereupon, to-wit, on July 1st, 1895, George B. Swift, the then mayor of said City of Chicago, issued his proclamation in words and figures as follows, to-wit; "Whereas, under the provisions of an Act of the General Assembly of the State of Illinois, entitled "An Act to regulate the Civil Service of Cities, approved and in force March 20th, 1895," there was duly submitted to a vote of the electors of the City of Chicago, at a general cityy election, held April 2nd, 1895, the proposition whether the city and its electors should adopt and become entitled to the benefits of said act; and, whereas, a large majority of the votes cast at such election were cast for such proposition and in favor of the adoption of said act; now, therefore, as required by said Act, I, George B. Swift, mayor of the City of Chicago, hereby declare that said act is in full force and effect in the City of Chicago from and after this date, and that in accordance with the provisions thereof, I have this day appointed as the
18 three Civil Service Commissioners under said act, John M. Clark, for the term of three years; Robert A. Waller, for the term of two years; and Christopher Holta, for the term of one year.

Dated July 1, 1895.

GEORGE B.. SWIFT."

Your petitioner further shows that upon the adoption by the said City of Chicago of the said Civil Service Act, so-called, and its becoming operative in said city pursuant to law and under said proclamation of the mayor, dated July 1st, 1895, all laws, or parts of laws, and all ordinances and regulations of said City of Chicago, inconsistent with said act, were thereupon and thereby repealed by virtue of Section 37 of said Civil Service Act, so-called.

Your petitioner further shows that by Section 3 of said Civil Service Act, it is expressly provided and required as follows: "Said commissioners shall classify all the offices and places of employment in said city, with reference to the examination hereinafter provided for, except those offices and places mentioned in Section II said act. The offices and places so classified by the commission shall constitute the classified service of such city; and no appointment to any office or place of employment shall be made except under and according to the rules hereinafter mentioned."

It is further provided by Section 4 of the Civil Service Act as follows: "Said commission shall make rules to carry out the purposes of this act and for examinations, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules." And your petitioner further shows that by Rule I of said rules adopted by said Civil Service Commissioners, it was among other things provided, as follows:

RULE I.

Classification.

"I. Unclassified Service.—Section II of said act provides
19 that the following offices and places of employment shall not be included in the classified service. Officers who are elected by the people, or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of the board of education, the superintendent of schools, heads of any principal department of the city, members of the law department, and one secretary of the mayor.

The offices and places above named shall constitute the unclassified service.

"2. Classified service.—All other offices and places or employment in said city under the provisions of said act, whether permanent, temporary or substitute, shall constitute the classified service. With reference to the examinations hereinafter provided for, they are hereby classified under two general classes, to be known as Class A and Class B, respectively. This classification is based mainly upon nature of employment. The positions embraced in Class A will be chiefly those of a permanent character, while those in Class B. will be more in the nature of temporary employment. The Commission will decide as occasion may require, in which class and division any particular office or place of employment shall belong.

"3. Official and Labor Service.—Class A. shall be known as the official service, and Class B. shall be known as the labor service.

"4. Divisions and Grades.—For convenience in designation, in carrying on examinations, certifying for appointments and promotions, and in making removals, the official service shall be divided into divisions based upon the character of the service to be performed, and each division shall be divided into grades, based upon the amount of compensation. The several divisions of the official service shall be as follows: * * *

20 "Division D.—Police Service.—All persons in the uniformed police force."

Your petitioner further shows to the court, that at the time of said classification he was a desk sergeant in said police force of said City of Chicago, in Grade Four of Division D., in Class A. at an annual salary of $1200. per year.

Your petitioner further, on information and belief, states that soon after the organization of said Civil Service Commission, in accordance with the terms of said act, the commissioners proceeded to classify, as required by said act, the various offices and places of employment of said City of Chicago; that such classification was made under and by virtue of said act, and the rules adopted by said Civil Service Commission. Your petitioner further avers that all policemen in said City of Chicago, including your petitioner, were, at the time of the adoption of said Rule 1, and at the time of said classification, in the uniformed police force of said city, and by

virtue of said act and rule of said commission and the classification thereunder, became and were classified in Division D, of the said official service of said City of Chicago, under said Civil Service Act; and thereupon the offices and places of employment so classified by said commission did "Constitute the classified service of said City of Chicago." And your petitioner further shows that by said provision, the classification of the offices of police patrolmen and sergeants in the police force of said City of Chicago then and there held by them, the then incumbents of said offices, including your petitioner, then and there became police, desk sergeant de jure, in the classified service of said City of Chicago, and your petitioner continued to discharge the duties of said desk sergeant in the said police force of said City of Chicago, until, to-wit, the 23rd day of November, 1907, receiving therefor as the monthly salary or pay that of a police patrolman on said police force.

21 And your petitioner further shows that by Section 31 and 32 of said Civil Service Act, it is provided as follows:

"SECTION 31. No comptroller or other auditing officer of a city which has adopted this act shall approve the payment of, or be in any manner concerned in paying any person any salary or wages for services as an officer or employé of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor.

"SECTION 32. No paymaster, or other officer or agent of a city which has adopted this act, shall willfully pay, or be in any manner concerned in paying any salary or wages for services as an officer or employee of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor."

And your petitioner further shows that the first Board of Civil Service Commissioners appointed by the mayor of said City of Chicago, George B. Swift, July 1st, 1895, in compliance with said Sections 31 and 32 of said Civil Service Act, passed upon and certified all the pay rolls of the employees and officers of said City of Chicago, including the pay rolls of all police patrolmen in the employ of the said City of Chicago; and it was then and ever since has been required by the comptroller of said City of Chicago, and by the Board of Civil Service Commissioners of said City of Chicago, as well as by Sections 31 and 32 of said Civil Service Act that all pay rolls in said City of Chicago, under said Civil Service Act, including the pay rolls of police patrolmen and sergeants in the police force of said City of Chicago, should be so certified as a condition of payment therefor. And your petitioner further shows that by said certification it was in legal effect declared by said Board of Civil Service Commissioners, that every person whose name was on the pay roll so certified was "entitled to be paid as a person occupying an office or place of employment" under and according to the provisions of said "Civil Service Act, and entitled to pay-

22 ment therefor" as being in the Classified Civil Service of said City of Chicago, under said act.

And your petitioner further shows that at the time of the classifi-

cation of the civil service of said City of Chicago, including all the positions in the uniformed police force of said city, in said department of police, provided by statute and ordinances of said city, said classification was published and distributed by said Civil Service Commissioners to the public, such publication being made August 13, 1895, your petitioner was a police desk sergeant in the said uniformed police force of the said City of Chicago; and that he thereupon became, by virtue of his office as police Desk sergeant in the police force then and there held by him, a member of the classified civil service of said City of Chicago as an officer de jure, and thereafter so continued, to-wit, from the said 1st day of June, 1895, to the 23rd day of November, 1907; and that he has never been legally discharged or separated from the office of police desk sergeant in the classified civil service of said city, or deprived of his office, as said police desk sergeant, by due process of law.

And your petitioner further shows that on, to-wit, the 23rd day of November, 1907, he was wrongfully, illegally and without due process of law reduced from the office of desk sergeant, to that of a police patrolman on the said police force of said City of Chicago, and served as a police patrolman on said police force until, to-wit the 2nd day of December, 1910. That until, to-wit, the 2nd of December, 1910, he was a police patrolman on the police force in the said City of Chicago, and continuously performed the duties of such police patrolman, in said city, and was carried upon the pay rolls of said City of Chicago, and from month to month was duly certified by said Civil Service Commissioners as a police patrolman entitled to pay as such under said Civil Service Act.

That at the Municipal election held in the City of Chicago,
23 in the month of April, 1907, Fred A. Busse, was duly elected mayor of said City of Chicago, and having duly qualified and entered upon his duties of such office, he became in law and in fact the mayor of said City of Chicago.

That on, to-wit, the 31st day of July, 1909, Leroy R. Steward was duly appointed by the then Mayor of said City of Chicago, said Fred A. Busse, as superintendent of police of said City of Chicago, by and with the advice and consent of the city council of said city; and said Le Roy T. Steward, having qualified as such superintendent of police of said city, entered upon the discharge of the duties of such office, and then and there became and was, and still is, by said appointment, the superintendent of police of said City of Chicago.

That on, to-wit; the 2nd day of December, 1910, as your petitioner is informed and believes, and upon such information and belief states the fact to be, that the said Le Roy T. Steward, as such superintendent of police of said City of Chicago, wrongfully, illegally, and without warrant of law, directed that the name of your petitioner be dropped from the pay-roll of police patrolmen of said city, and thereupon by and under such direction the name of your petitioner was dropped without any written charges having been preferred against your petitioner, by the proper officer; and without any trial of any charges of any nature against your peti-

tioner, before a proper trial board; nor was any such action because of any alleged misconduct on the part of your petitioner.

That from thence hitherto the said Le Roy T. Steward, claiming to act in that behalf as said superintendent of police of said city, on, to-wit, said 2nd day of December, 1910, caused the name of your petitioner to be omitted and excluded from the pay-roll of the police patrolmen on the said police force of said City of Chicago; and still causes the name of your petitioner to be omitted and excluded from such pay-roll. That said conduct of said Le Roy T. Steward,
24 said superintendent of police of said city, in so causing the name of your petitioner to be omitted and excluded from said pay-roll, was and is a wrongful denying to your petitioner of his legal rights, as said police patrolman of said City of Chicago, to the emoluments of his said office, and was without due process of law.

That in consequence of the said wrongful action of the said Le Roy T. Steward, as superintendent of police of said city, up to and including the present time, in causing the omission of your petitioner's name to be dropped from the pay-rolls of police patrolmen of said city, your petitioner has not been paid any portion of the salary accruing and due to him as a police patrolman as aforesaid from, to-wit, said 2nd day of December, 1910, until the present time. And your petitioner has made demand upon the said City of Chicago, and upon said Fred A. Busse, mayor of said City of Chicago, and upon Le Roy T. Steward, as superintendent of police of said City of Chicago, which demand was made during their said incumbency of their respective offices, that his name should be placed on, or restored to, the pay roll of police patrolmen of said City of Chicago, to the end that your petitioner might be enabled to draw the salary due him as a police patrolman alike the salary already accrued to him from month to month as such police patrolman of said City of Chicago, to which he is justly and lawfully entitled; but the said City of Chicago, the said Fred A. Busse, as mayor thereof, and the said Le Roy T. Steward, as superintendent of police thereof, have respectively refused to comply with your petitioner's reasonable and lawful demand in the premises, and still do refuse so to do. That no part of the salary so accrued and accruing and due your petitioner as aforesaid from said 2nd day of December, 1910, until the present time, has ever been paid to your petitioner, although your petitioner has made a demand therefor.

Your petitioner further shows that under the provisions of the law of the state and the ordinances of said City of Chicago,
25 the salary to which your petitioner was lawfully entitled from said 2nd day of December, 1910, until the present time, was the sum of $100. per month, less one per cent thereof, which under the provisions of the Police Pension Act, so-called, as a part of the statute law of the State of Illinois, in force during the period aforesaid, should be deducted by the Police Pension Board or other proper authority of said City of Chicago, from the salary of your petitioner and paid into the Police Pension Fund of said City. And in this behalf your petitioner further shows that from the time of

missioners that all persons whose names were upon said pay rolls, so-called, by the comptroller and other officers of said city, such officers and said City of Chicago, in legal effect, admitted that all persons whose names were upon such pay-rolls were occupying an office or place of employment under and according to the provisions of said Civil Service Act, and entitled to payment thereunder as being in the classified service of said city, under said act.

And your petitioner insists that the City of Chicago, said Fred A. Busse, as mayor of said city, and Le Roy T. Steward, as superintendent of police of said city, are, respectively, estopped by law and the facts hereinbefore stated and set forth, to now deny that your petitioner was on the 2nd day of December, 1910, and from thence hitherto has been a police patrolman in the classified civil service of said City of Chicago, under said Civil Service Act, and was then and there entitled to all the privileges and protection afforded by said act.

29 Your petitioner further states that the Civil Service Commissioners now in office, as such under said Civil Service Act, are M. R. Lower, Zina R. Carter and M. L. McKinley.

And your petitioner further shows that by the appropriation made by the city council of the City of Chicago, for the year 1910, for the payment of employés of said city, and for other municipal purposes, there was an appropriation made for police patrolmen on the police force of said city, then upon the pay-rolls of said city, and so in the classified civil service aforesaid, including among the number of such patrolmen on said police force in said city, the name of your petitioner; and that your petitioner was entitled under said appropriation to be taken and carried upon said pay-rolls for said year, 1910, as being in the employment of said city in the classified civil service thereof.

Wherefore your petitioner prays a writ of mandamus under the seal of said court directed to said City of Chicago, and Fred A. Busse, as mayor of said City of Chicago, and to Le Roy T. Steward, as superintendent of police of said City of Chicago, and to M. R. Lower, Zina R. Carter and M. L. McKinley, as Civil Service Commissioners of said City of Chicago, commanding said City of Chicago, and Fred A. Bussa, as mayor of said City of Chicago, and said Le Roy T. Steward, as superintendent of police of said City of Chicago, as follows:

To forthwith place the name of your petitioner, upon the roster of police patrolmen, and upon the police pay-roll of said City of Chicago, to the end that your petitioner may hereafter draw the pay now due your petitioner, and that may hereafter become due your petitioner, and that may hereafter become due your petitioner from month to month, as other police patrolmen on the police force of said City of Chicago are paid; and commanding said M. L. Lower, Zina R. Carter and M. L. McKinley, as Civil Service Commissioners of said City of Chicago, as follows:

30 To certify the name of your petitioner as a person entitled to pay as a police patrolman of said City of Chicago, whenever his name shall hereafter appear as such police patrolman upon

any pay-rolls of policemen pre-ented to said civil service commissioners by the proper officer of said City of Chicago, for certification thereof, to the end that your petitioner may hereafter draw the pay due him as a police patrolman of said City of Chicago, as other patrolmen, on the police force of said City of Chicago, are paid.

Your petitioner asks that such other and further order may be made in the premises, as justice may require, etc.

CHARLES H. GERSCH,
Petitioner,
By A. B. CHILCOAT,
His Attorney.

31 Thereupon on the same day to-wit, on the 15th day of February, A. D. 1911, a certain People's Writ of Summons issued out of the Office of the Clerk of said Court and under the Seal thereof directed to the Sheriff of Cook County to execute which writ together with the return of the Sheriff thereon endorsed are in words and figures following to-wit:

Law Summons.

STATE OF ILLINOIS,
County of Cook, ss:

Superior Court of Cook County.

The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you summon City of Chicago and Fred A. Busse, as Mayor of said City of Chicago and Le Roy T. Steward as Superintendent of Police of said City of Chicago and M. R. Lower, Zina R. Carter and M. L. McKinley as Civil Service Commissioners of said City of Chicago if they shall be found in your County, personally to be and appear before the Superior Court of Cook County on the 20th day of February thereof, to be held at the Court House, in Chicago, in said Cook county to answer unto Charles H. Gersch in this certain Petition for Mandamus filed in said Court on the Law side thereof.

And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness, Charles W. Vail, Clerk of our said Court, and the Seal thereof, at Chicago, aforesaid, this 15th day of February, A. D. 1911.

[SEAL.] CHARLES W. VAIL, *Clerk.*

32 284.747. Superior Court of Cook County, Feb'y Term, 1911. Chas. H. Gersch vs. City of Chicago et al. Summons in Law. Mandamus. Filed February 23, 1911. Charles W. Vail, Clerk. A. B. Chilcoat, Solicitor.

Pd. 1.75.
M. .10

Served this writ on the within named defendant the City of Chicago, by delivering a copy thereof, to Fred A. Busse, Mayor of said City, this 15th day of February, A. D. 1911.

The other within named defendants not found in my county. Michael Zimmerman, Sheriff, by A. E. Barrett, Deputy.

And afterwards, to-wit, on the 20th day of February, A. D. 1911, a certain Demurrer was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 284,747; Term No. 12453.

CHARLES H. GERSCH
vs.
CITY OF CHICAGO, FRED A. BUSSE, as Mayor; LEROY T. STEWARD, as Superintendent of Police, and E. R. Lower, Zina R. Carter, and M. L. McKinley, as Civil Service Commissioners.

33 Now comes the above named respondents by Edward J. Brundage, Corporation Counsel, their attorney, and say that the above petition and the matters therein contained in manner and form as the same are therein and thereby set forth and alleged are not sufficient in law for the petitioner to maintain his aforesaid action, and that these respondents are not bound by law to answer the same, and this they are ready to verify.

Wherefore, for want of a sufficient petition in this behalf, the respondents pray judgment and that the petitioner may be barred from maintaining his aforesaid action.

EDWARD J. BRUNDAGE,
Corporation Counsel,
Attorney for Respondents.

P. R. JAMPOLIS,
Assistant Corporation Counsel, of Counsel.

O. C. B.
J. I. E.

And afterwards to-wit on the 23rd day of February, A. D. 1911, a certain Notice was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

Petition for Mandamus.

In the Superior Court of Cook County.

CHARLES H. GERSCH, Petitioner,
vs.
CITY OF CHICAGO et al., Respondents.

34 To Edward J. Brundage, Corporation Counsel and Attorney for Respondent.

SIR: Please take notice that on Monday, February 27, 1911, at 10 A. M. or as soon thereafter as counsel can be heard I shall appear before his Honor Judge McDonald or McSurely in the Court Room in said County usually occupied by him and move the Court to dispose of the general demurrer heretofore filed by you in said Cause, at which time and place you may be present if you see fit.

A. B. CHILCOAT,
Attorney for Petitioner.

Service of above notice, by copy received this 23rd day of Feb. *May*, 1911.

EDWARD J. BRUNDAGE,
Corporation Counsel and Attorney for Respondent.

R. R. JAMPOLIS,
Assistant Corporation Counsel, of Counsel.

And afterwards to-wit on the fourth day of March, A. D. 1911, the following proceedings were had and entered of record in said Court to-wit:

Mandamus.

284,747.

PEOPLE OF THE STATE OF ILLINOIS ex Rel. CHARLES H. GERSCH
vs.
CITY OF CHICAGO, FRED A. BUSSE, Mayor; LE ROY T. STEWARD, Supt. of Police; M. R. Lower, Zina R. Carter and M. L. McKinley, Civil Service Commissioners of City of Chicago.

This cause coming on to be heard upon the demurrer to
35 the petitioner's petition filed herein, after arguments of counsel, and due deliberation by the Court, said demurrer is sustained, to which the petitioner excepts and thereupon said petitioner elects to stand by his said petition filed in said cause.

Thereupon it is considered by the Court that the petitioner take nothing by his said suit and the respondents go hence without day

Honorable William M. Farmer, Justice;
Honorable Alonzo K. Vickers, Justice;
Honorable Frank K. Dunn, Justice;
Honorable George A. Cooke, Justice;
William H. Stead, Attorney General;
Warren C. Murray, Marshal.
Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered, that afterward to-wit, on the 20th day of June, 1911, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

Error to Superior Court Cook ——.

No. 7656.

CHARLES S. GERSCH, Plaintiff in Error,
v.
CITY OF CHICAGO et al., Defendants in Error.

Appeal from ——.

40 Docket No. 7656—Agenda 39.

April, 1911.

CHARLES H. GERSCH, Plaintiff in Error,
v.
CITY OF CHICAGO et al., Defendants in Error.

On February 15, 1911, the plaintiff in error filed a petition in the Superior Court of Cook county praying for a writ of mandamus to place his name upon the roster of police patrolmen of the city of Chicago and upon the pay-roll and to certify his name for payment of his salary as such police patrolman. A demurrer was sustained to the petition, and the petitioner having elected to stand by it, the petition was dismissed at his costs. The petitioner has sued out a writ of error from this court to review the judgment on the ground that by it his right to share in the police pension fund is abridged, in violation of the fourteenth amendment to the constitution of the United States and of section 2 of article 2 of the constitution of this State.

The petition sets out very fully the provisions of the charter of the city of Chicago of 1863 in regard to the police department, the amendment thereof and a number of ordinances of the city upon the subject of the police; the adoption by the city of the Cities and Villages act on April 23, 1875; the passage on June 28, 1875, of an ordinance for the re-organization of the police department, and on April 13, 1881, of another ordinance on that subject; the adoption on March 25, 1895, of the City Civil Service act by the voters

of the city and its going into effect on July 1, 1895. All these facts are alleged as they appeared in the case of Bullis v. City of Chicago, 235 Ill. 472. The petition also alleges the appointment of a board of civil service commissioners, and their adoption of a board of civil service commissioners, and their adoption of rules and classification of the offices and places of employment in the city. It is then alleged that Charles H. Gersch, the plaintiff in error, was appointed to the office of police patrolman on August 17, 1876, by the general superintendent of police, took the oath of office, entered upon the performance of his duties and continued therein until wrongfully discharged; that he continued in office and was recognized as police patrolman by the mayors, superintendents of police and city councils and no successor was appointed for him but money was appropriated for his salary, and his salary as such police patrolman was paid to him until July 1, 1893, when he was promoted to police patrol sergeant, the duties of which office he performed until
41 June 1, 1895, when he was promoted to police desk sergeant, which office he held when the Civil Service act went into effect, July 1, 1895; that thereupon he became a member of the classified civil service of the city of Chicago and so continued as police desk sergeant until November 23, 1907, when he was wrongfully reduced to the office of police patrolman, in which he served until December 2, 1910, when his name was dropped from the pay-roll by order of the superintendent of police, wrongfully and without warrant of law, without any written charges, without trial and for no alleged misconduct. During all the time from July 1, 1895, to December 2, 1910, all pay-rolls of officers and employees of the city of Chicago, including police patrolmen and sergeants in the police force, have been certified by the board of civil service commissioners, and the plaintiff in error has been so certified and paid.

Mr. Justice Dunn delivered the opinion of the court:

In Bullis v. City of Chicago, 235 Ill. 472, and in numerous other decisions both before and since, many, if not all, of which are cited in Preston v. City of Chicago, 246 Ill. 26, questions decisive against the contention of the plaintiff in error have been determined. At the foundation of his case lies the proposition that the office of police patrolman was created by the charter of the city of Chicago in 1863 and was not abolished when the city adopted the Cities and Villages act. The cases referred to have decided this proposition against him, and have decided that there is now in force no statute creating the office of police patrolman and that a suit of this character cannot be maintained without an ordinance creating the office. His counsel devotes himself to a vigorous argument that these cases were wrongly decided and the positions announced in them should be abandoned, but we are not convinced and it would be useless to repeat the argument. Not only does the petition fail to allege any ordinance creating such office, but counsel states in his brief that there is no such ordinance, and that therefore it follows that if the court adheres to its former decisions there are no policemen, either de jure or de facto, in the city of Chicago. This may be true, and it may be true that there is a defect in the law in regard to the

method authorized by the Cities and Villages act of creating offices and filling them, and an inconsistency, because of such defect, between that act and the City Civil Service act. If so, it is the province of the legislature and not the court to correct such defect or inconsistency.

Under the former decisions of the court, to which we adhere, the demurrer was properly sustained.

Judgment affirmed.

42 *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of People State of Illinois ex rel. Charles H. Gersch, Plaintiff in error, vs. The City of Chicago, Fred A. Busse, as Mayor of said City, Le Roy T. Steward, as Superintendent of Police of said City and M. R. Lowe, Zina R. Carter and M. L. McKinley, as Civil Service Commissioners of said City, Defendants in error, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, this 22nd day of November, A. D. 1911.

[Seal of the Supreme Court, State of Illinois, Apr. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court.

43 Be it remembered, to-wit, that on the 22nd day of November, A. D. 1911, there was duly filed by People State of Illinois ex rel. Charles H. Gersch in the office of the Clerk of the Supreme Court of the State of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois, which documents are in words and figures as follows to-wit:

44 In the Matter of the Petition of CHARLES H. GERSCH for a Writ of Error from the Supreme Court of the United States of America to the Supreme Court of Illinois.

To the Honorable, —— ——, one of the Justices of the Supreme Court of the United States of America:

Now comes Charles H. Gersch, of the City of Chicago, in the County of Cook, in the State of Illinois, plaintiff in error and petitioner herein, by A. B. Chilcoat, his attorney, and complains that in the record and proceedings in said cause, including the final judgment of the Supreme Court of the State of Illinois, therein against the plaintiff in error, which final judgment was rendered on the 20th day of June, 1911, there is manifest error, and that the

said Supreme Court of the State of Illinois erred in its holdings and decision therein, to the great damage of said plaintiff in error, Charles H. Gersch, petitioner herein. And petitioner shows and states unto your Honor the following as such errors, and the basis or grounds for this petition, to-wit:

First. The allegations of petitioner's petition, filed in the Superior Court of Cook County, in the State of Illinois, the truth of which allegations was, by the demurrer to said petition, admitted, show that the petitioner was, by the action of said defendants in error, set forth in said petition, and by the judgment of said Superior Court and the affirmance thereof, by the final judgment of said Supreme Court of Illinois, wrongfully and without due process of law, deprived of his right to have his name carried upon the payroll as a policeman upon the police force, in the department of police, in the City of Chicago, and to draw his monthly salary or pay, as other policemen upon said police force are paid, without his written request to be retired from said police force on account of his disabilities, and without such request by the Board of
45 Trustees of the Police Pension Fund, and in violation of the Statute of the State of Illinois, in such case made and provided.

The law in such case made and provided by the legislature of the State of Illinois represented in the General Assembly was enacted by an act of said legislature, entitled "An Act to provide for the setting apart, formation and disbursement of Police Pension Fund in cities, villages and incorporated towns, Approved April 29, 1887. In force July 1, 1887," Revised Statute of Illinois (Hurd) 1905, pp. 178, 179 and 180.

We will specifically call attention to sections 2, 3, 4 and 5, of said act.

That part of said section 2 that we desire to all attention to, reads as follows:

"A board composed of five members, residents of such city, village or town, to be chosen as hereinafter provided, shall be and constitute a board of Trustees to provide for the disbursement of said fund or funds and designate the beneficiaries thereof as herein directed, which board shall be known as the board of trustees of the Police Pension Fund of such city, village or town who shall not hold during their term of membership on said board any appointive or elective political office or positions. They shall be appointed by the Mayor or President of the Board of Trustees of such city, village or town. * * * The two other persons who, with the members above designated shall constitute said board, shall be chosen, one from the active police force and one from the body of pensioners under the act, of such city, village or town."

Said Section 3 reads as follows:

"Whenever any person at the time of the taking effect of said act, to which this is an amendment, or thereafter shall be duly appointed and sworn, and have served for the peroid of twenty years or more upon the regularly constituted police force of such
46 city, village or town of this state, subject to the provisions of this act, or where the combined years of service of any per-

son upon the police force and the fire department, as aforesaid, of such city, village or town of this state, shall aggregate twenty years or more, said board shall order and direct that such person, after becoming fifty years of age and his services on such police force shall have ceased, and all officers entitled to and having a pension under said act, to which this is an amendment, after the taking effect of this act, shall be paid from such fund, a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement; provided however, the *maxiam* of said pension shall not exceed the sum of $900 and the minimum not less than $600. And after the decease of such member, his widow or minor child or children under sixteen years of age, if any survive him, shall be entitled to the pension, provided for in this act, of such a deceased husband or father; but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of said police department after she shall have re-married. And provided further, that all police officers retired after twenty years' service in the police department of such city, village or town, and who are above the age of fifty years now on the police pension rolls shall receive the same pension now allowed them. Provided, that in no case shall said pension exceed the sum of $900. (As amended by act approved and in force May 16, 1903.)"

Said Section 4 reads as follows:

"Whenever any person, while serving as a policeman, in any such city, village or town, shall become physically disabled while in and in consequence of the performance of his duties as such policeman, said board shall upon his written request, or without such request, if it deem it for the good of said police force, retire such person from active service, and order and direct that
47 he be paid from said fund a yearly pension not exceeding one-half the amount of the salary attached to the rank which he may have held on said police force at the time of his retirement: Provided, that the maximum sum of such pension shall not exceed the sum of $900 per year; and the minimum not less than $600; provided further that whenever such disability shall cease such pension shall cease.." (As Amended by act approved and in force May 16, 1903.)

Said Section 5 reads as follows:

"No person shall be retired as provided in the next preceding section, or receive any benefit from said fund unless there shall be filed with said board certificates of his disabilities, which certificates shall be subscribed and sworn to by said person and by the police surgeon (if there be one) and two practicing physicians of such city, village or town, and such board may require other evidence of disability before ordering such retirement and the payment aforesaid." Revised statutes of Illinois (Hurd) 1905, pp. 378, 379 and 380.

Your petitioner further shows, that said action was without written notice of disabilities preferred against him, said petitioner, and

without any request that he retire from the duties of his said office because of his physical disabilities, by said board, and without being given an opportunity to be heard by said board.

That he was thus excluded from the exercise of his duties as a policeman upon said police force, as aforesaid; and deprived of his rights to perform his duties as such policeman, and to receive his monthly salary or pay as other policemen upon said police force in said city are paid; and that said action and the approval thereof by the Superior Court of said Cook County, and the affirmance thereof by the final judgment of the Supreme Court of Illinois, was and is a deprivation of petitioner's right to a written notice of charges of physical disabilities preferred against him by said board,
48 and was in violation of section 2 of Article of the Constitution of the State of Illinois, and also of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Second. The Supreme Court of the State of Illinois, by its judgment of affirmance herein, of the judgment of the Superior Court of Cook County, Illinois, failed to recognize or give effect to the provisions of said sections 2, 3, 4, and 5 of the said Pension Fund Act, and the provisions of Section 2 of Article 2 of the Constitution of the State of Illinois; and also failed to recognize and enforce petitioner's right to have written charges preferred against him by the proper board, and the right to be heard in his defense; rights secured to him under the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Third. The Supreme Court of the State of Illinois, by its affirmance of the judgment, herein, of the Superior Court of Cook County, Illinois, determined and held that the facts, stated in the Petitioner's said petition, gave the petitioner therein no right to the relief as therein prayed; which action of said Supreme Court of Illinois was in legal effect a deprivation of petitioner's property rights, in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Fourth. The Superior Court of Cook County, Illinois, erred in sustaining the demurrer of the defendants in error to the petition filed by petitioner in said Superior Court of Cook County, Illinois, on February 15, 1911, and in dismissing the petition of the petitioner, plaintiff in error herein, at the costs of plaintiff in error herein, and in entering judgment in said cause against this petitioner, plaintiff in error herein; and the Supreme Court of
49 Illinois erred in its judgment affirming said judgment of said Superior Court.

Fifth. The Superior Court of Cook County, Illinois, erred in entering judgment in said cause of March 4, 1911, and dismissing the petition of your petitioner, plaintiff in error, and in entering judgment in said cause against petitioner, plaintiff in error therein, for costs; and the Supreme Court of the State of Illinois erred in its judgment affirming said judgment of said Superior Court.

Therefore petitioner hereby prays a writ of error from said de-

cision and judgment to the Supreme Court of the United States of America, and an order fixing the amount of the bond.

CHARLES H. GERSCH,
Petitioner,
By A. B. CHILCOAT,
His Attorney.

[Endorsed:] Filed Nov. 22, 1911. J. McCan Davis, Clerk of Supreme Court.

50 In the Supreme Court of Illinois, April Term, A. D. 1911.

CHARLES H. GERSCH, Plaintiff in Error,
vs.
CITY OF CHICAGO et al., Defendants in Error.

Writ of Error to the Superior Court of Cook County.

Assignments of Errors.

Now comes the plaintiff in error, Charles H. Gersch, by his attorney, A. B. Chilcoat, and says that in the record and proceedings aforesaid there is manifest error, and for special grounds for such error shows:

(1) The Superior Court of Cook County erred in sustaining the demurrer of the defendants (defendants in error) to the petition, filed herein.

(2) The said Superior Court of Cook County erred in entering in said cause on March 4, 1911, and dismissing said petitions out of court at the costs of said petitioner, and in entering judgment in said cause against petitioner for costs.

(3) The allegations of petitioner's petition by defendants' general demurrer admitted to be true show that petitioner was, without due process of law, deprived of his rights to have his name upon the pay roll of police patrolmen in the police department of the City of Chicago, and to draw his pay as other police patrolment in said department are paid, in that he was so deprived of his said rights in violation of Section 3, 4 and 5 of the Police Pension Fund Laws of the State of Illinois; which action was and is a deprivation of petition's rights, in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States; and for that reason said Superior Court erred in sustaining said general demurrer and dismissing said petitions out of Court, and in entering judgment against said petitioner for costs.

51 (4) The allegations of petitioner's petition by defendants' general demurrer admitted to be true, show that petitioner was, without due process of law, deprived of his rights, to have his name upon the pay roll of police patrolmen in the police department of the City of Chicago, and to draw his pay as other police patrol-

men of said city are paid, in that petitioner was so deprived of his said rights without having written charges preferred against him by the proper authorities, Board of Trustees of the Police Pension Fund, and a right to be heard in his defense; which action was in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States; and for that reason said Superior Court erred in sustaining said general demurrer to the petition, and entering judgment against petitioner for costs.

(5) The allegations of petitioner's petition, by defendants' general demurrer admitted to be true, show that the petitioner was unlawfully, wrongfully and without due process of law, deprived of his rights to have his name upon the pay roll of police patrolmen in the police department of the City of Chicago, and to draw his pay as other police patrolmen are paid, in that petitioner was deprived of his rights without due process of law, and the equal protection of the law in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States; and for that reason the said Superior Court erred in sustaining the general demurrer to the said petitioners as was done in this case.

Wherefore said petitioner, Charles H. Gersch, prays that the judgment aforesaid be reversed, and the cause remanded for such further proceedings as are agreeable to justice and the law of the land.

CHARLES H. GERSCH,
Petitioner,
By A. B. CHILCOAT,
His Attorney.

[Endorsed:] Filed Nov. 22, 1911. J. McCan Davis, Clerk of Supreme Court.

52 Be it remembered that on the 22nd day of November, A. D. 1911, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by People — State of Illinois ex rel. Charles S. Gersch, plaintiff in error in the petition for writ of error, an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in words and figures as follows to-wit:

53 Know all men by these presents, that we, Charles H. Gersch and American Bonding Company of Baltimore as surety, are held and firmly bound unto City of Chicago, Illinois, in the full and just sum of Five Hundred Dollars, to be paid to the said City of Chicago, Illinois: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors and assigns, jointly and severally, by these presents. Sealed with our seals and dated this sixteenth day of November, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a session of the Supreme Court of the State of Illinois in a suit depending in said Court, between Charles H. Gersch and City of Chicago, Illinois, a judgment was rendered against the said Charles H. Gersch and the said Charles H. Gersch having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Chicago, Illinois, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Charles H. Gersch shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void else to remain in full force and virtue.

CHARLES H. GERSCH, [SEAL.]
By STEPHEN A. DAY,
His Attorney.
——— ———. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of
——— ———.
——— ———.

Approved by
HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Filed Nov. 22, 1911. J. McCan Davis, Clerk of Supreme Court.

54 Be it remembered that on the 22nd day of November, A. D. 1911, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error, which is hereby attached and is in words and figures as follows, to-wit:

55 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of Illinois ex rel. Charles H. Gersch, plaintiff in error, and The City of Chicago, Fred A. Busse, as Mayor of said City, Le Roy T. Steward, as Superintendent of Police of said City, and M. R. Lowe, Zina R. Carter, and M. L. McKinley, as Civil Service Commissioners of said City, defendants in error, wherein was

drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction
56 of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 16th day of November, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Filed Nov. 22, 1911. J. McCan Davis, Clerk of Supreme Court.

57 *Certificate of Lodgment.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of the Supreme Court of the State of Illinois, do hereby certify that there was lodged with me as such Clerk on the 22nd day of November, A. D. 1911, in the matter of People — State of Illinois ex rel. Charles H. Gersch, Plaintiff in error, vs. The City of Chicago, Fred A. Busse, as Mayor of said City, Le Roy T. Steward, as Superintendent of Police of said City and M. R. Lowe, Zina R. Carter and M. L. McKinley, as Civil Service Commissioners of said City, Defendants in error.

1. The original bond of which a copy is herein set forth.
2. A copy of the writ of error to file in my office.

In Testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, this 22nd day of November, A. D. 1911.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court.

58 Be it remembered, to-wit, on the 22nd day of November, A. D. 1911, the original citation was filed in the office of the Clerk of Supreme Court, which original Citation is in words and figures following to-wit:

59 UNITED STATES OF AMERICA, *ss:*

To the City of Chicago, Fred A. Busse, as Mayor of said City, Le Roy T. Steward, as Superintendent of Police of said City, and M. R. Lowe, Zina R. Carter, and M. L. McKinley, as Civil Service Commissioners of said City, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Illinois, wherein The People of the State of Illinois ex rel. Charles H. Gersch is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Horace H. Lurton, Associate Justice of the Supreme Court of the United States, this 16th day of November, in the year of our Lord one thousand nine hundred and eleven.

HORACE H. LURTON,
Associate Justice of the Supreme Court of the United States.

60 On this 21st day of November, in the year of our Lord one thousand nine hundred and eleven, personally appeared before me, the subscriber, A. B. Chilcoat, and makes oath that he delivered a true copy of the within citation to the City of Chicago, Carter Harrison, as Mayor thereof, and personally, as Mayor of said City, and to John McWeeny, Superintendent of Police of said City, and to Harmon M. Campbell, President of the Civil Service Commissioners of said city.

A. B. CHILCOAT.

Sworn to and subscribed the 21st day of November, A. D. 1911.

[SEAL.]

A. H. KAUFMANN,
Notary Public.

61 UNITED STATES OF AMERICA, *ss:*

Received a copy of the attached citation, this 18th day of November, 1911.

THE CITY OF CHICAGO,
By CARTER H. HARRISON,
As Mayor Thereof, and Personally, as Mayor of said City.

O. K. for service.
WM. H. SEXTON,
Corporation Counsel.
11/18/11.

Received a copy of the attached citation, this 18th day of November, 1911.

JOHN McWEENY,
Superintendent of Police of said City of Chicago.

Received a copy of the attached citation, this 18th day of November, 1911.

HARMON M. CAMPBELL,
President of the Civil Service Commissioners of said City of Chicago.

Filed Nov. 22, 1911. J. McCan Davis, Clerk of Supreme Court.

62 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

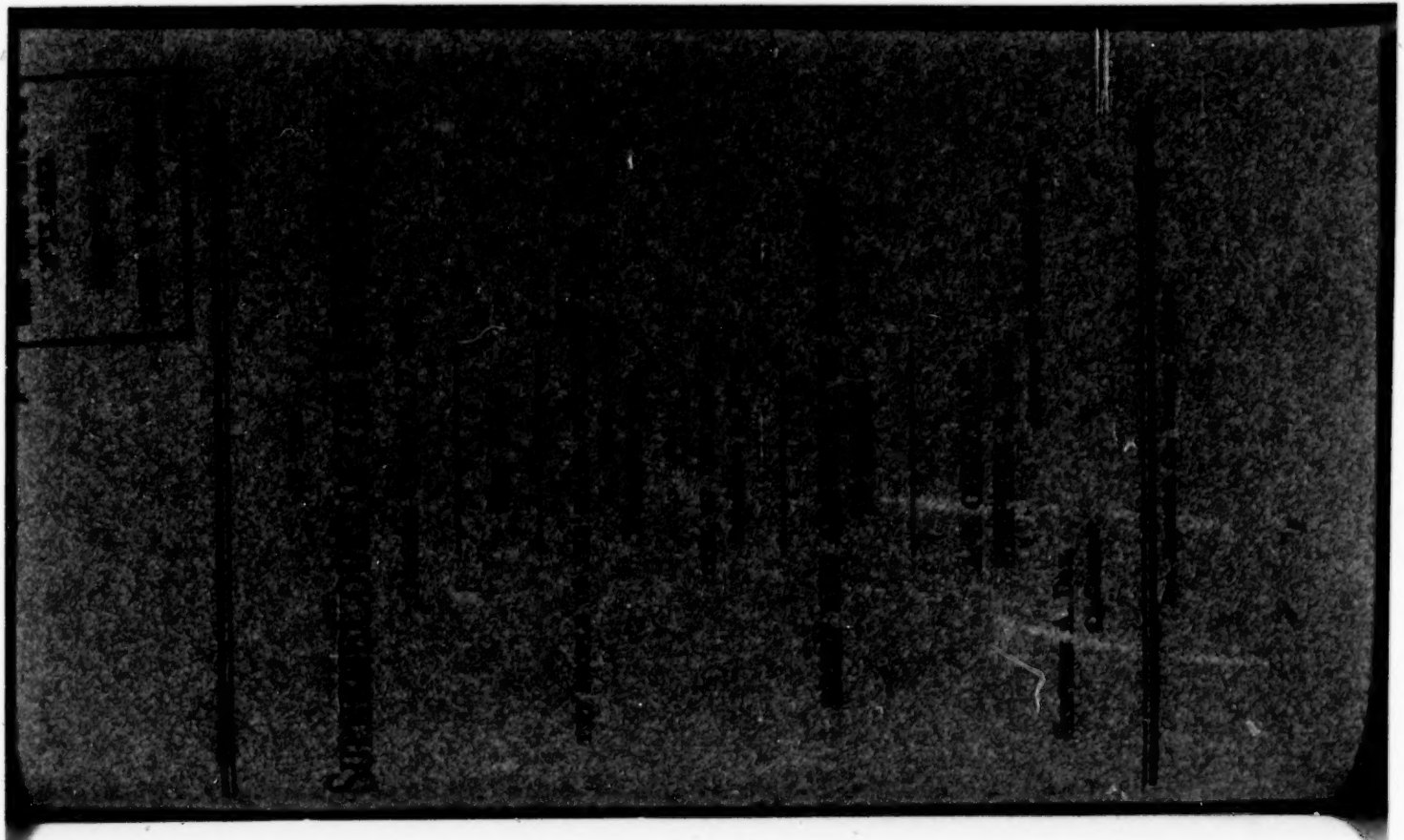
In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Illinois, in the City of Springfield, this 22nd day of November, A. D. 1911.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court, Illinois.

Endorsed on cover: File No. 22,947. Illinois Supreme Court. Term No. 871. The People of the State of Illinois ex rel. Charles H. Gersch, plaintiff in error, vs. The City of Chicago, Fred A. Busse, as mayor of said city; Le Roy T. Steward, as supt. of police of said city, et al. Filed November 29, 1911. File No. 22,947.



SUBJECT INDEX.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 474

THE PEOPLE OF THE STATE OF ILLINOIS, Ex Rel. Charles H. Sersch,
Plaintiff in Error,

vs.

CITY OF CHICAGO et al.,
Defendants in Error.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

May it please the Court:

We have heretofore filed in this court a brief in opposition to motion of defendants in error to dismiss or affirm, and we respectfully call the attention of the court to the argument therein contained. The salient facts in the case are set forth in these briefs and it will therefore be unnecessary for us to repeat them at this time.

The merits of this case lie within a narrow compass. Plaintiff in error filed his petition in the state court of original jurisdiction and a general demurrer was filed thereto on behalf of the defendants in error. The state court sustained said demurrer and the petition was ordered dismissed. After writ of error to the Supreme Court of Illinois, this judgment was affirmed (Opinion 250 Illinois, 551). The sole question, therefore, is whether the petition sets forth facts which entitled plaintiff in error to the relief sought. The petition was filed under the Illinois statute, regulating the writ of mandamus and appropriate allegations of fact are therein set forth showing that relator was a duly qualified and acting policeman in the City of Chicago, at the time of his unlawful and arbitrary removal from the pay-roll of policemen in said city, and sufficient facts are presented to establish the validity of relator's claim.

The attempted removal of relator from the pay-roll aforesaid was illegal and was not only without due process of law, but without any process of law. There is no contradiction of the fact that relator was removed from the pay-roll of policemen in said city without notice of any charges preferred against him and without any opportunity to be heard in his defense. No charges of any kind whatever were made against him and he was given no hearing whatever. The removal was summary, arbitrary and a mere exercise of power, if any such existed within the officer seeking to remove him. The demurrer admits the allegation in the petition, that plaintiff in error was not guilty of any misconduct on his part.

The real question in this case is whether relator was deprived of any right protected by the Federal Constitution. To understand what legal rights were acquired by him and which were arbitrarily and ruthlessly taken from him in violation of the Federal Constitution, it will be necessary for us to show to this court the facts upon which our claim of a denial of constitutional liberty are based.

We approach the development of our positions with confidence that the exercise of a Federal right was denied to relator in three different aspects of the case:

1. Relator was illegally removed from the pay-roll of policemen.
2. Relator was removed from said pay-roll without due process of law and was denied equal protection of the laws.
3. Relator was deprived of his right to share in the Police Pension Fund illegally and without due process of law.

Assignments of Error.

First. The allegations of petitioner's petition, filed in the Superior Court of Cook County, in the State of Illinois, the truth of which allegations was, by the demurrer to said petition, admitted, show that the petitioner was, by the action of said defendants in error, set forth in said petition, and by the judgment of said Superior Court and the affirmance thereof, by the final judgment of said Supreme Court of Illinois, wrongfully and without due process of law, deprived of his right to have his name carried upon the pay-roll as a policeman upon the police

force, in the department of police, in the City of Chicago, and to draw his monthly salary or pay, as other policemen upon said police force are paid, without his written request to be retired from said police force on account of his disabilities, and without such request by the Board of Trustees of the Police Pension Fund, and in violation of the statute of the State of Illinois, in such case made and provided.

The law in such case made and provided by the legislature of the State of Illinois represented in the General Assembly was enacted by an act of said legislature, entitled "An Act to provide for the setting apart, formation and disbursement of Police Pension Fund in cities, villages and incorporated towns, Approved April 29, 1887. In force July 1, 1887." Revised Statutes of Illinois (Hurd), 1905, pp. 178, 179 and 180.

We will specifically call attention to Sections 2, 3, 4 and 5 of said act.

That part of said Section 2 that we desire to call attention to, reads as follows:

> "A board composed of five members, residents of such city, village or town, to be chosen as hereinafter provided, shall be and constitute a board of trustees to provide for the disbursement of said fund or funds and designate the beneficiaries thereof as herein directed, which board shall be known as the Board of Trustees of the Police Pension Fund of such city, village or town who shall not hold during their term of membership on said board any appointive or elective political office or positions. They shall be appointed by the Mayor or president of the board of trustees of such city, village or town. * * * The two other persons who, with the

members above designated shall constitute said board, shall be chosen, one from the active police force and one from the body of pensioners under the act, of such city, village or town."

Said Section 3 reads as follows:

"Whenever any person at the time of the taking effect of said act, to which this is an amendment, or thereafter shall be duly appointed and sworn, and have served for the period of twenty years or more upon the regularly constituted police force of such city, village or town of this state, subject to the provisions of this act, or where the combined years of service of any person upon the police force and the fire department, as aforesaid, of such city, village or town of this state, shall aggregate twenty years or more, said board shall order and direct that such person, after becoming fifty years of age and his services on such police force shall have ceased, and all officers entitled to and having a pension under said act, to which this is an amendment, after the taking effect of this act, shall be paid from such fund, a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement; provided, however, the *maximum* of said pension shall not exceed the sum of $900 and the minimum not less than $600. And after the decease of such member, his widow or minor child or children under sixteen years of age, if any survive him, shall be entitled to the pension, provided for in this act, of such a deceased husband or father; but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of said police department after she shall have re-married. And provided further, that all police officers retired after twenty

years' service in the police department of such city, village or town, and who are above the age of fifty years now on the police pension rolls shall receive the same pension now allowed them. Provided, that in no case shall said pension exceed the sum of $900." (As amended by act approved and in force May 16, 1903.)

Said Section 4 reads as follows:

"Whenever any person, while serving as a policeman, in any such city, village or town, shall become physically disabled while in and in consequence of the performance of his duties as such policeman, said board shall upon his written request, or without such request, if it deem it for the good of said police force, retire such person from active service, and order and direct that he be paid from said fund a yearly pension not exceeding one-half the amount of the salary attached to the rank which he may have held on said police force at the time of his retirement: Provided, that the maximum sum of such pension shall not exceed the sum of $900 per year; and the minimum not less than $600; provided further that whenever such disability shall cease such pension shall cease." (As amended by act approved and in force May 16, 1903.)

Said Section 5 reads as follows:

"No person shall be retired as provided in the next preceding section, or receive any benefit from said fund unless there shall be filed with said board certificates of his disabilities, which certificates shall be subscribed and sworn to by said person and by the police surgeon (if there be one) and two practicing physicians of such city, village or town, and such board may require other evidence of disability before or-

dering such retirement and the payment aforesaid." Revised Statutes of Illinois (Hurd) 1905, pp. 378, 379 and 380.

Your petitioner further shows, that said action was without written notice of disabilities preferred against him, said petitioner, and without any request that he retire from the duties of his said office because of his physical disabilities, by said board, and without being given an opportunity to be heard by said board.

That he was thus excluded from the exercise of his duties as a policeman upon said police force, as aforesaid; and deprived of his rights to perform his duties as such policeman, and to receive his monthly salary or pay as other policemen upon said police force in said city are paid; and that said action and the approval thereof by the Superior Court of said Cook County, and the affirmance thereof by the final judgment of the Supreme Court of Illinois, was and is a deprivation of petitioner's right to a written notice of charges of physical disabilities preferred against him by said board, and was in violation of Section 2 of Article .. of the Constitution of the State of Illinois, and also Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Second. The Supreme Court of the State of Illinois, by its judgment of affirmance herein, of the judgment of the Superior Court of Cook County, Illinois, failed to recognize or give effect to the provisions of said Sections 2, 3, 4 and 5 of the said Pension Fund Act, and the provisions of Section 2 of Ar-

BRIEF.

I.

Relator was classified and certified by the Civil Service Commission as an officer in the classified civil service of the City of Chicago and is entitled to notice and hearing before removal.

Civil Service Act, City of Chicago, Hurd's Rev. Stat. Illinois (1912), page 393 *et seq.*

The People v. *Kipley*, 171 Illinois, 44.

People v. *Loeffler*, 175 Illinois, 585.

City of Chicago v. *Luthardt*, 191 Illinois, 516.

Ptacek v. *The People*, 194 Illinois, 125.

Id., Chicago Law Journal for June 8, 1900.

Powell v. *Bullis*, 221 Illinois, 379.

McNeill v. *The City of Chicago*, 93 Illinois Appellate, 124; 212 Illinois, 481.

Second Annual Report, Civil Service Commission of City of Chicago, for year ending December 31, 1896.

Gilbert v. *Board of Police, etc., of Salt Lake City*, 11 Utah, 378; 40 Pacific Reporter, 264.

The People ex rel. Wilson v. *Knox et al.*, 61 New York Supplement, 472.

People ex rel. Gorman v. *Police Board*, 35 Barber, 527.

Emmitt v. *Mayor, etc., of New York*, 128 New York, 117.

Larsen v. *City of St. Paul*, 83 Minnesota, 473; 86 Northwestern Reporter, 459.

State v. *Wyman*, 71 Ohio St., 1.

Eckloff v. *District of Columbia*, 135 U. S., 240.

State v. *Walbridge*, 153 Missouri, 194; 54 Southwestern Reporter, 447; 41 American State Reports, 663.

Gracey v. *City of St. Louis*, 213 Missouri, 384; 111 Southwestern Reporter, 1159.

Garfield v. *United States*, 211 U. S., 249.

United States ex rel. Turner v. *Fisher*, 222 U. S., 204.

United States v. *Wickersham*, 201 U. S., 390.

II.

Office of police patrolman was created by State of Illinois in 1863 providing charter for City of Chicago, and such office was not abolished by subsequent statutes of that state.

Stott v. *City of Chicago*, 205 Illinois, 281.

Bullis v. *City of Chicago*, 235 Illinois, 472.

Roth v. *State of Indiana*, 158 Indiana, 243; 63 Northeastern Reporter, 460.

Charter City of Chicago, of March 4, 1837, 1863, 1865. Private Laws Illinois.

Cities and Villages Act, Illinois.

Hurd's Rev. Stat. Illinois (1912), page 243 *et seq.*

Brennan v. *The People ex rel. Kraus et al.*, 176 Illinois, 620.

City of East St. Louis v. *Maxwell*, 99 Illinois, 439.

Gunnarshon v. *City of Sterling*, 92 Illinois, 569.

III.

Relator was deprived of his rights illegally.

Wilson v. *North Carolina*, 169 U. S., 586.
Meade v. *Deputy Marshal*, 1 Brock., 324.
Yick Wo v. *Hopkins*, 118 U. S., 356.

IV.

Relator was deprived of a fundamental right without due process of law and was denied the equal protection of the laws in violation of the Fourteenth Amendment.

Allen v. *Georgia*, 166 U. S., 140.
Hovey v. *Elliott*, 167 U. S., 409.
Kennard v. *Louisiana*, 92 U. S., 480.
Foster v. *Kansas*, 112 U. S., 201.
Wilson v. *North Carolina*, *supra*.
Louisville and Nashville Railroad Company v. *Schmidt*, 177 U. S., 230.
Taylor v. *Beckham*, 178 U. S., 548.
Iowa Central Railroad Company v. *Iowa*, 160 U. S., 389.
Cincinnati Street Railway Company v. *Snell*, 193 U. S., 30.
Rogers v. *Peck*, 199 U. S., 425.
Simon v. *Craft*, 182 U. S., 427.
Jordan v. *Massachusetts*, 225 U. S., 167.
Story, Constitution (Fourth Edition), Sec. 1950.

V.

Relator was deprived of his right to share in the Police Pension Fund illegally and without due process of law.

Police Pension Fund Law, Illinois, Hurd's Rev. Stat. Illinois (1912), page 369 *et seq.*

Pennie v. *Reis*, 132 U. S., 464.

Kavanagh v. *Board, etc.*, 134 California, 150; 66 Pacific Reporter, 36.

ARGUMENT.

I.

We insist that the relator, being in office as a police patrolman at the time of the classification of offices by the Civil Service Commission, as set forth in his petition, became at once, upon such classification, and by virtue of said act, an officer in the classified civil service in said city, and entitled to all the protection conferred by that act upon such officers.

Relator under the statutory law of the State of Illinois was a municipal officer in the City of Chicago at the time of his attempted removal. Under the provisions of the Civil Service Act of that state in force in the City of Chicago commencing in 1895, all offices and places of employment in such city were classified and it was provided that all offices and places so classified by the Civil Service Commission should constitute a classified civil service and that no appointments to any such offices or places should be made, except under and according to the rules therein mentioned. By the terms of this act all previous inconsistent laws were repealed and the purpose of the act was to put an end to the appointment and removal of officers at the pleasure of the appointing power. Certain exceptions are made in Section 11 of the act, but as they apply only to elective officers, members of the Board of Education, heads of the principal departments of the city, etc., it is unimportant to dwell thereon.

Under the power granted by this act the Civil Service Commission in Chicago classified the offices and places in said city and under such classification Class A was made to include the official service as opposed to Class B, which includes places of employment and of lesser degree. Under Rule 1 of said commission, Section 4 thereof, it was provided that:

> "For convenience in designation, in carrying on examinations, certifying for appointments and promotions, and in making removals, the official service shall be divided into divisions based upon the character of the service to be performed, and each division shall be divided into grades, based upon amount of compensation."

Among the several divisions of the official service is found the following:

> "Division D. POLICE SERVICE. All persons in the uniformed police force."

The relator, at the time of such clasification, was in the uniformed police force of said city, and by virtue of the action just recited became a member of the official service of said city and as such a municipal officer. We respectfully call the attention of the court at this point to our brief filed upon the motion to advance this case, wherein is fully set forth (page 25 *et seq.*) the provisions of the Civil Service Act and the rules of said Civil Service Commission.

By the terms of said act it was provided that no officer or employe in the classified civil service of any city who should have been appointed under the

rules and after the examination therein mentioned should be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. We contend, without fear of contradiction, that after the taking effect of this act removals of officers, at the pleasure of the appointing power and without having charges preferred and a hearing in their defense, were no longer possible under the statutory law of Illinois. The plain intent and purpose of the act is to recognize those already in office and substitute for the future a system of appointments based upon merit, and to provide for removals only for sufficient cause. The mere arbitrary exercise of power on the part of appointing officials was rendered illegal and ineffectual thereafter.

As we have said, this act went into effect in the City of Chicago in the year 1895. Its construction first came before the Supreme Court of Illinois in the case of *The People* v. *Kipley*, 171 Ill., 44, 75, wherein was clearly presented the question as to whether the Civil Service Act superseded prior enactments with reference to the police department in the City of Chicago. In that case, the court, speaking through Mr. Justice Magruder, said:

> "These ordinances further provide, that there shall be certain subordinates or assistants for each of these departments, who are specifically named in the ordinance. By the terms of the ordinances all of these subordinates or assistants, with a few exceptions to be hereafter mentioned, were appointed in each department by the head of that department, either with the approval and consent of the Mayor, or without

such approval or consent. * * * *It is conceded by counsel on both sides in their arguments, that the legislature passed the Civil Service act with full knowledge of the ordinances of the city of Chicago, which designated each of officers already named as the head of each of the departments above mentioned.*

* * * * * * * *

"But section 11 also says that officers 'whose appointment is subject to confirmation by the city council' shall not be included in the classified service. * * * Section 3 provides that the commissioners shall classify all the offices and places of employment in the city with reference to the examinations provided for, except the offices and places of employment mentioned in section 11. * * * *When these words of section 3 are applied to section 11, section 11 means, that all officers and employes of 'any principal department of the city' except the head 'or heads' thereof shall be included in the classified service.* * * *

"*That ordinance requires, that certain subordinate officers or employes in certain of the principal departments of the city government shall be 'designated as heads of principal departments,' as said term is used in section 11 of the Civil Service act, 'and shall be nominated by the mayor and shall be confirmed by the city council.'* * * * *If it is a valid ordinance, and has the effect which it was intended to have, it will certainly nullify and make worthless the Civil Service act.* * * * The ordinance does not create any new office or any new department, but simply provides that certain subordinate officials in departments already created shall be designated as heads of principal departments, and shall be appointed in a different manner from that, in which existing ordinances require them to be appointed. * * * The ordinance of June 28 provides in effect,

that certain designated subordinates in the principal departments of the city government shall not be included in the classified service. *The ordinance is, therefore, directly in the teeth of the statute.* * * *

"**The Civil Service act provides that all laws or parts of laws, which are inconsistent with it or with any of its provisions, were thereby repealed. Hence, any provision, either of the City and Village act, or of any ordinance of the city, which provided for a different mode of appointment than that specified in the Civil Service act, was repealed, except so far as it might come within the exception named in section 11.**

"Our conclusion upon this branch of the case is, that the assistant superintendent of police, inspectors of police and captains of police, are not excepted from the operation of the Civil Service law by the provisions of section 11, or any other provision in the act. *The same is true as to all positions in the other principal departments of the city government herein mentioned, which are of a lower grade than the chiefs or heads of those departments or which are subordinate to such chiefs or heads.*" (Italics ours.)

Soon thereafter, the construction of said act came before that court upon an original petition for mandamus filed by the People, on the relation of the Attorney General, against one Loeffler, City Clerk of the City of Chicago, who, insisting upon the power to appoint the clerks and subordinate officials in his office, refrained from complying with the terms of the Civil Service Act and maintained that the provisions of said act had no application to the subordinate officials and clerks within his office. The question was thus clearly and early called to the attention of the highest court in Illinois and by the

decision of that court it was settled that the Civil Service Act did have application to the various clerks and subordinates in the office of the City Clerk of Chicago, inasmuch as the act required that *all* offices and places of employment in said city be classified, and when so classified should constitute the civil service of said city. It was insisted on the part of Loeffler that the provisions of the Civil Service Act did not take away the arbitrary power of appointment and removal theretofore vested in the City Clerk and that there was no repeal of the previously existing law by the terms of the Civil Service Act. In answer to that contention, the Supreme Court of Illinois said:

> "The provisions of the Civil Service Act are in conflict with Section 22 of Article 7 of the City and Village Act. Under Section 22 the City Clerk had the power to appoint his employes, and such appointments were during his pleasure. But the Civil Service Act establishes a new system by which all city employes are to be selected on account of their fitness and merit, as ascertained by examinations held under and in pursuance of the law. The act, which requires appointments thus to be made, is necessarily in conflict with an act, which left such appointment to the uncontrolled will and discretion of the appointing power. It is true that there is no express repeal in the Civil Service Act of said Section 22. It is also true that repeals by implication are not favored. But the Civil Service Act is subsequent in date by a period of more than twenty years, to the City and Village Act; and, where there is an irreconcilable inconsistency between an older act and a later act it will be presumed that the Legislature intended by the latter to repeal the

former. A subsequent statute, which revises the whole subject of a former one and is intended as a substitute for it, operates as a repeal of the former, although there are no express words of repeal. The object of Section 22, above referred to, was to designate a particular mode for the appointment of the employes of the City Comptroller, City Clerk, City Treasurer and City Collector. That mode may be termed the pleasure of the appointing power. The object of the Civil Service Act is to designate another and different mode of appointing such employes, and that mode is fitness and merit, as ascertained by free and public and competitive examinations. Where, by the language used in a statute, a thing is limited to be done in a particular manner, 'it includes a negative that it shall not be done otherwise.' Where the appointments to all subordinate positions under the city government are required by an affirmative enactment to be made upon the basis of merit and fitness as ascertained by examinations, there is necessarily included in such enactment a prohibition against appointments made at the will of the appointing power. The two methods of appointment thus indicated are so inconsistent with each other that Section 22 and the Civil Service Act, considered with reference to the positions therein named, cannot stand together; and, therefore, the repeal of Section 22 is inferred from necessity.

* * * * * * * *

"That there is such repugnancy, as is above referred to, between said Section 22 and the provisions of the Civil Service Act will appear from an examination of the law. Section 3 of the Civil Service Act provides that: 'Said commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this

act.' The City Comptroller, the City Clerk, the City Treasurer and the City Collector are city officials and a part of the city government. Therefore, the subordinate positions and places of employment under these officials come under the designation of 'offices and places of employment in such city.' All the offices and places of employment in such cities, and not a part of them, except those mentioned in Section 11, are to be classified under the Civil Service Act. It necessarily follows that the subordinate places under the City Clerk fall among the places of employment which are subject to classification. By the terms of Section 11, the four officials named in Section 22 are not included in the classified service, but the exceptions mentioned in Section 11 do not include clerks and subordinates in the offices named in Section 22. It is difficult to see how an act, which provides that all offices and places of employment in the city, except those named in Section 11, shall be classified by the Civil Service Commissioners, can be consistent with Section 22 of the City and Village Act, which provides, in substance, that the clerks and subordinates of four particular city officials shall be appointed in a different mode from that contemplated by such classification." (*People* v. *Loeffler*, 175 Illinois, 585, 592.)

The above case was cited with approval in the later case of *City of Chicago* v. *Luthardt*, 191 Ill., 516, wherein, by *per curiam* opinion, the Supreme Court of Illinois adopted as its opinion, that of Mr. Justice Windes of the Appellate Court of that state. After referring to the fact that it had been contended that the relator in that case was not an officer in the strict sense, the eminent judge refers to the above case, and, proceeding with his opinion (page 521) says:

"Section 3 of the Civil Service Act empowers the Commissioners to classify all the offices and places of employment in the city, except those who are elected by the people and others specified in Section 11 of the act, not now in question, and provides that the offices and places so classified by the commission shall constitute the classified Civil Service of the city. Section 4 of the same act provides that the Commissioners shall make rules for carrying out the purposes of the act, and for examinations, appointments and removals in accordance with its provisions. The commissioners did adopt rules, classified the offices and places of employment into two general classes, known as class 'A' and class 'B', respectively. These rules provide (No. 3) that class 'A' shall be known as the Official service and class 'B' as the labor service, and under the further provisions of the rules as to classification, the chief clerk of the detective bureau falls in class 'A', division 'C' and grade 5. It will thus be seen that under the Civil Service Act and the rules of the commissioners the position of appellee was that of a municipal officer, within the meaning of this act."

The correctness of the above statement with respect to the Civil Service Act in the City of Chicago is not and cannot be questioned. It is the settled law of that state. But it has been contended that inasmuch as the relator was one of a large number of officers who were in office at the time of the adoption of said act (and necessarily did not take any examination and was not required so to do), that the benefits of the act against removal, except for cause and after notice and hearing, were not hereby accorded to him and those similarly situated. The unsoundness of this contention is at once apparent. Rather than ex-

tend this brief by argument on our part, we desire only to call attention to the well reasoned opinion of Judge Tuley, reported in the Chicago Law Journal, June 8, 1900, affirmed by the Appellate Court, and by the Supreme Court of Illinois in the case of *Ptacek* v. *The People,* 194 Ill., 125.

That learned and greatly respected Judge said:

> "All the offices and places of employment were duly classified and became the classified civil service of the city. The police had its superintendent, its assistant superintendent, inspectors of police, captains, lieutenants, sergeants and patrolmen. *As soon as that classification was made the entire police force came under the law.* No reasons can be perceived, as 'holdovers' belonged to the classified civil service, why they with others composing one rank or grade, could not compete for the next highest rank or grade in any promotional examination ordered to take place. *The act was clearly intended to apply to the entire force in the condition in which it might be found when such classification should be completed.*"

It should further be borne in mind, in considering Judge Tuley's opinion, that the point specially under consideration by him was the right of "holdover" policemen, under the provisions of the act, to take the promotional examinations provided for in the act itself and the rules adopted by the Civil Service Commission thereunder. Upon this point the learned jurist spoke as follows:

> "Can there be any other examinations than those expressly provided for in Section 6 and 9? This is an important question in connection with the right of the 'holdover' to become a civil service appointee, and to have the benefit

of the law in protecting him in the tenure of his office. The requirement of the law that 'all offices and places should be classified, and when thus classified shall constitute the classified civil service of the city,' *shows an intent to bring every official and employe so classified under the operation of the law.* Section 11 of the act exempting specifically certain named officials from its operation, shows an intent that all others shall be subject to the act; but when do they become subject to all the provisions of the act is the question. The city contends, not until all the offices and places have become filled with civil service appointees, appointed to fill vacancies that occur from time to time. Under such a construction of the act, its benefit would be postponed indefinitely. It is true a certain section of the act, Section 12, prohibiting removal or discharge, except upon written charges and an opportunity to be heard, is limited to the officers and employes in the classified civil service, who shall have been appointed under the rules of the Commission and after examination. This would seem to make a distinction between appointees under the act, and those who were in offices and places at the time the act went into effect, and generally called 'holdovers.' As all were 'holdovers' when the act went into effect, it would be a strained construction of the act to hold that it was the intent of the law to await the slow process of filling vacancies before there could be a complete civil service in the city.

"Considering the abuses sought to be remedied, and the object and purposes of the law in establishing the merit system, a liberal construction of the act should be made in order to effect the purpose intended. *I am of the opinion that the intention of the Legislature was to bring every office and place of employment in the city, except those mentioned in Section 11, under the complete operation of the law at the*

> *earliest possible moment, and that the officers and employes in office at the time that the act went into effect, as well as the public, should receive the benefit of all its provisions.* * * * The necessity of doing away with the distinction between 'holdovers' and civil service appointees must be apparent, and there can be no doubt but that the efficiency of the civil service will be greatly promoted by securing to every official and employe the right to hold his position until discharged for cause, after a hearing upon written charges, and also the right to seek promotion upon his merits." (Italics ours.)

The complete answer to such contention is that all in office, classified at the time said act went into effect were original appointees under the act and of course were not required to take an examination. The act by its terms is prospective in its operation as to those seeking appointment after its adoption, and the very idea of classification of existing offices and places of employment would be idle and meaningless, if it did not recognize that there were such offices and places of employment already in existence. We quote the following from the opinion by Mr. Chief Justice Wilkin of the Supreme Court of Illinois, in *Ptacek* v. *The People*, *supra* (page 131):

> "There is no rule of the commission authorizing an original examination to be held, in the first instance, to fill each and all of the positions in the police department, and if there was, it could not be enforced in view of the foregoing provisions of Section 3 of the act, which authorizes the Civil Service Commission to classify all the offices and places in the city with reference to examinations afterwards provided for, and making that classification the classified civil service of the city, and prohibiting ap-

pointments to any of such offices or places except under and according to the rules of the commission. This section manifestly contemplates that the classification, in the first place, shall be made without any original examination. Section 9, which is the only section of the act providing for the filling of vacancies in the service, requires such vacancies to be filled by promotion, and Sections 1 and 3 of Rule 10 can be given practical effect only by such promotional examinations.

"Appellant contends that Section 6 of the act contemplates an original examination in every instance, and that it has been violated by the commission in the adoption of the foregoing sections of Rule 10. That section is as follows: 'All applicants for offices or places in said classified service, except those mentioned in Section 11 [which exception is not material in this consideration], shall be subject to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character,' etc. We think it clear, in view of the provisions of Section 9, that this provision relates only to such original examinations as may be held under the act, and not to promotional examinations, as contemplated by the latter section—that is, to original appointments to the position of second-class patrolman. By this construction the various sections of the act and the rules adopted by the board are brought into harmony, and, in our opinion, will give effect to the object and purposes of the act. We do not understand how the Civil Service Commission could, under its rules, hold an original examination for the position of assistant superintendent of police unless it is shown in some way that the vacancy in that office could not be filled by promotion, and this, we think, the pleas wholly failed to do. The third plea

> does not aver that there were no 'employees of the next lower grade' who could or who were willing to take the promotional examination, nor do we think the plea would have been sufficient if it had so averred. The question, in the promotional examination to fill vacancies, whether there are employes of the next lower grade competent and willing to take the examination, is one which must be determined by the commission under its rules, and cannot be left open to its determination upon each examination to fill vacancies. It is perfectly clear in this case that the examination under which appellant secured his appointment was not made 'public, competitive and free to all the citizens of the United States' because there were no employes in the position of inspectors of police who were competent and willing to take a promotional examination, but because, as is now contended by counsel, the commission construed the act as authorizing such an original competitive examination in every instance."

In the case of *Powell* v. *Bullis*, 221 Illinois, 379, the procedure under the Civil Service Act is recognized and enforced in favor of the petitioner, Bullis, who was a policeman in the City of Chicago and had applied for a writ of certiorari to review the action of the Civil Service Commission in removing him. In the opinion in that case (pages 380, 381) it is said:

> "In that case [*Commissioners, etc.*, v. *Griffin*, 134 Illinois, 330] property rights were involved, hence it is not an authority against the proposition that the writ may issue when only personal rights are involved, and many cases may be found in this and other states where the writ has issued when only personal rights were involved. (*Miller* v. *Trustees of Schools*, 88 Ill., 26; *Merrick* v. *Township Board of Arbela*,

41 Mich., 630; *State* v. *Whitford*, 54 Wis., 150; *Gilbert* v. *Board of Police*, 40 Pac. Rep., 264.) We think the Superior Court had jurisdiction to issue the writ.

"The main reason urged by appellee as grounds for sustaining the judgment of the lower courts is, that the record filed as a return to the writ does not show that Bullis was notified of the time and place fixed by the Civil Service Commission for a hearing upon the charges preferred against him, or that he waived notice of the time and place of hearing by appearing before said Police Trial Board or otherwise. Section 12 of the Civil Service Act provides: 'No officer or employe in the classified civil service * * * shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense.' And Section 1 of Rule 8 of the Civil Service Commission provides: 'The commission shall cause notice in writing to be personally served on the accused, or to be mailed to him at his own address, as shown by the records of the commission, stating the time (which shall not be less than five days after the service of mailing of such notice) and place when and where such charges will be investigated, and shall give the accused an opportunity to be heard in his own defense at such investigation.' The giving or waiver of such notice was clearly jurisdictional (*Commissioners of Highways* v. *Smith*, 217 Ill., 250), and as the court could only determine that question from an examination of the record filed as a return to the writ (*Joyce* v. *City of Chicago, supra*), and the record failed to show that Bullis had been notified or waived notice of the time and place of his hearing upon the charges preferred against him, we think the Police Trial Board was without power to hear the charges made against him or the Civil Service Commission to approve the same and order him dis-

charged as a patrolman from the police force of the City of Chicago, and that the trial court properly quashed the proceedings of the commission."

In the case of *McNeill* v. *The City of Chicago*, 93 Ill. Appellate, 124, petition was filed by one of the so-called "holdovers," and, after demurrer, it was held by the court that the petition was valid, and the following language was used in the course of the opinion (page 127):

"As is seen by the allegations of the petition, which in the consideration of the question here presented must be taken as true, appellant had been continuously a police patrolman of the City of Chicago for more than eight years at the time of the passage of the Civil Service Act, and was acting as such police patrolman at the time the act went into effect in Chicago. He was what, in common acceptance, when speaking of employes or officers of the city who were in service when the Civil Service Act became operative, is known as a 'holdover.'

"In a carefully considered opinion by Judge Tuley of the Circuit Court, reported in the Chicago Law Journal of June 8, 1900, p. 130, in *Mather et al.* v. *Kerfoot et al.*, and other cases consolidated therewith, in which were involved the positions of certain inspectors and captains of police of Chicago, he says: 'The Civil Service Law did not affect the tenure of office or the power or removal of such holdovers. As to all further applicants for positions, and as to filling all vacancies in the civil service, the act was intended to have immediate effect, and to that end the law requires (Sec. 3) that the commission shall classify all the offices and places of employment in such city with reference to the examinations' provided for by the act, except,

however, certain offices and places mentioned in Section 11 of the act. This exception does not apply to police patrolmen. An examination of the act demonstrates that Judge Tuley is correct in his statement above quoted. It is unnecessary to set out the specific provisions of the act. Section 3 also provides that 'the offices and places so classified by the commission shall constitute the classified civil service of such city; and no appointments to any such offices or places shall be made except under and according to the rules hereinafter mentioned.'

"Section 10 of the same act provides that, 'The head of the department or office in which a position classified under this act is to be filled shall notify said commission of that fact, and said commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs. * * * The appointing officer shall notify said commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to by said commission therefor, which appointment shall be on probation for a period to be fixed by said rules.'

* * * * * * * *

"Appellees also claim that appellant was discharged on March 6, 1898, and because he waited nineteen months before filing his petition for mandamus, that was a sufficient reason for the court to refuse him the relief asked. The very basis of this contention, viz., the discharge of appellant, is not sustained by the record, and therefore the authorities cited in support of the contention, which were cases of discharge, are not applicable. There is no allegation in the petition that appellant was ever discharged. On the contrary, the allegations are positive that he was appointed to the position of police patrolman in 1887, and remained such 'from thence

hitherto.' The allegations that appellant was dropped from the pay-roll, that his name had been omitted and excluded therefrom, and that he had not been paid his salary, fall short of showing a discharge.

"Inasmuch as, according to the petition, appellant has never been discharged from his position as a police patrolman, it is unnecessary to discuss the method by which he could or might be discharged. It is sufficient for the determination of this case that it appears from the allegations of the petition that appellant was duly and regularly appointed a police patrolman, was in service as such when the Civil Service Act came in force, that he has ever since continued such patrolman, has never been charged with any misconduct or dereliction of duty, that his name has been dropped from the police pay-rolls by direction of the police superintendent and continuously excluded therefrom, and appellant deprived of his salary, though he has demanded of the city, the Mayor and Superintendent of Police that his name should be restored to said pay-roll, and that such demand has been refused."

After the demurrer had been overruled the case proceeded in the court below upon answer filed and was finally determined in the Supreme Court of Illinois against the relator's contentions, and is reported as *McNeill v. City of Chicago*, 212 Ill., 481.

In the petition now before the court appropriate allegations are made showing the classification of relator, his certification as a municipal officer in the City of Chicago, his having been placed upon the official pay-roll, and, as such, paid for a considerable period of time. All this was done by the Civil Service Commission, an administrative body, acting un-

der authority conferred upon them by the State of Illinois, represented in its Legislature. It is to be accorded due process of law in the protection and defense of this right that the relator is now asking the relief of this court, and at this point we wish to emphasize that after the passage and adoption of the Civil Service Act in Chicago, in the year 1895, that the term and tenure of relator's office was during good behavior, as fixed by the Civil Service Act, *and that no action of the municipality was necessary or required by law upon such subject.* It will, therefore, at once be apparent that whether or not there was any ordinance in existence has no bearing, since relator is seeking his constitutional rights based upon his classification and certification by the Civil Service Commission, and not alone by reason of his original appointment.

It is our contention that the Civil Service Act as passed by the Illinois Legislature intended to, and did, do away with all appointments at the will of the appointing power, *and likewise covered removals at the will of the appointing power.* It cannot be seriously contended that the intention of the Legislature was not to establish a merit system and abolish arbitrary appointments. It being clear that the arbitrary appointments are abolished, it also follows conclusively that arbitrary removals are abolished likewise. If this be not so, then after the adoption of the Civil Service Act we no longer have appointments at the will of the appointing power, but removals in such manner are still retained. Certainly in the absence of language so plainly written that the intent clearly appears, no court would be

justified in placing this construction upon an act which was passed to do away with the abuses theretofore existing with respect to the "spoils system" and appointments given as the reward for political service. Then, too, the Legislature was familiar with the conditions in Chicago and knew that the methods theretofore pursued by which the police department was demoralized and passed this law for the express purpose of putting an end thereto.

Any doubt in this regard is settled forever by reference to the second annual report of the Civil Service Commission of the City of Chicago, being for the year ending December 31, 1896, and addressed to Hon. George B. Swift, then Mayor of Chicago, which said report is printed as an official document. Upon page 15 thereof we find the following:

> "Under the terms of the law, all persons in the employ of the city when the law went into effect became members of the Classified Service by operation of the law. They are protected in their positions during good behavior by the fact that if removed the officer making the removal has no power to fill the vacancy. This is the same measure of protection which is extended by the Federal Civil Service Law to the members of the National Classified Service, and in practical operation during a series of years, has been found ample and effective. It is not probable that wholesale removals will ever again be made in this city, or that removals will be made at all, except for good cause. If good cause does exist in any case, then the removal should be made, and it should be made just the same whether the person was appointed before the law went into effect or afterwards. A change in the municipal administration will fairly test the value of the law, and it is firmly be-

lieved that the restraining influence that it will then exert in the matter of removals and appointments will commend it more strongly than ever to the good opinion of the public.

"The act as it stands, has been pronounced by those most competent to judge, the best law yet passed by any legislature upon the subject of which it treats, and it is believed that it will, if properly enforced, fully accomplish the purpose for which it was enacted."

In the same document, following the copy of the Civil Service Act, as Appendix "G", are found the Civil Service rules and special attention is called to page 54, wherein, under the heading of Official Service, is found the provision for the uniformed police force, being, as we have heretofore said, Division "D" thereunder, and to page 65 covering removals, being Rule 9 thereof, paragraph 1 of which is as follows:

"RULE IX.

REMOVAL.

"1. How Made. The removal of an officer or employe, who has been appointed to the official service in accordance with these rules, can only be made as provided in Section 12 of said act."

By Rule 10, found on page 66 thereof, provision is made for what is known as the "Civil List of the City of Chicago," which is to be kept in the office of the commission and is the official list. We quote as follows:

"RULE X.

"3. Civil List. A list to be known as the 'Civil List of the City of Chicago' shall be kept in the office of the commission, to contain the

name of every person employed in, or receiving compensation in, the Classified Service. The list shall show respecting every officer and employe: The title of his office, the salary or compensation thereto attached, the time he has held such office, the time he has been in the service of the City of Chicago and the places in the service he has filled, a brief specification of the duties of the office, by whom the appointment thereto is made, and the term, if any, of the office.

"4. Payment of Salaries. As provided in Section 31 of said act, no payment or compensation for services rendered, after the taking effect of these rules, can be made by the city, or any of its officers, to a person holding a position in the Classified Service until it appears either that he was employed in such position before these rules took effect, or that he has been employed under the provisions of the same, and is holding his position in accordance therewith."

It has been recognized in the decisions of the courts of this country that upon the adoption of civil service acts those in office and classified need not take the examination required of those seeking appointment after such adoption and in this connection the following cases are cited in support thereof:

Gilbert v. *Board of Police, etc., of Salt Lake City*, 11 Utah 378; 40 Pacific Reporter, 264.

The People ex rel. Wilson v. *Knox et al.*, 61 New York Supplement, 472.

People ex rel. Gorman v. *Police Board*, 35 Barber, 527.

Emmitt v. *Mayor, etc., of New York*, 128 New York, 117.

Larsen v. *City of St. Paul, Minn.*, 83 Minnesota, 473; 86 N. W., 459.

State v. *Wyman*, 71 Ohio State, 1.

In the case of *Gilbert* v. *Board of Police, etc., of Salt Lake City, supra*, the Supreme Court of Utah, in disposing of the contention therein made, that the Civil Service Act of that state should be so construed as to compel all officers and employes in office at the time of the adoption of the act to take an examination, such as provided for those seeking appointments in the future, said:

> "Such a construction would compel all such employes, at the mere pleasure of the board, to submit either to a removal from service or to undergo the competitive examination provided for in the act for applicants who may be seeking employment; and it appears in this case that the board acted on such construction, for it demanded of the relator that he undergo such an examination as a condition precedent to his continuing in its employ. An examination of the entire act reveals no such legislative intent, and, if there is any doubt as to the meaning of the word 'employed', in Section 6, such doubt is removed by Section 9, for in that section the Legislature expressly provides that: 'Such rules and regulations shall specify the date when they shall take effect, and thereafter all selections of persons for employment, or appointment, or promotion,' etc., shall be made according to such rules and regulations. The provision is for selections to be made thereafter; that is, after the rules and regulations have been adopted. There was manifestly no intention to include among applicants for employment those who were already in the service. Nor was it necesary to so include employes to secure efficiency in either department, because there is ample provision in the act to secure the removal and dismissal of all those who may be unfaithful or incompetent. To compel persons who were in the employ of either department at the

> time of the passage of the act, and who continued therein, to submit to an examination, or, failing so to do, to suspend or remove them from service for such failure, is unwarranted under the law." (40 Pac. Rep., 268.)

The rule above mentioned is recognized in the State of New York in the two cases above cited from that state, and we quote briefly from them.

In *People ex rel. Wilson* v. *Knox, supra*, it is said:

> "The practical purpose to be attained by civil service laws is not only to secure for the public service, but to retain in that service, those who are qualified for the positions in which they are placed by the tests of the law in force at the time of their original entry into service." (61 N. Y. Sup., 473.)

And to the following from the case of *People ex rel. Gorman* v. *Board of Police, supra*, in which after citing the leading case of *People ex rel. McCune* v. *Board of Police*, 19 N. Y., 188, the court proceeds as follows:

> "But he was not appointed by the defendants, the new board of police. He was continued in the performance of his duty as a policeman under the new act and under the new board, by a higher power than themselves, the Legislature of the State, from which authority the new board alone derive the power they possess. It stands undisputed that the relator was in office lawfully on the 15th of April, 1857, when the new law was passed, and also on the 23d of April, 1857, when the new board were organized and held their first meeting." (35 Barber, 529.)

In the case of *State* v. *Walbridge*, 153 Mo., 194; 54 Southwestern, 447; 41 Am. St. Rep., 663, the Su-

preme Court of Missouri, in speaking of the legal rights of the relator, said (54 Southwestern, 449):

> "To the office of policeman, from which he was removed, he had good title. He was in possession, and no one was disputing it. To that office the law attached a monthly salary, to that salary he was entitled so long as the law remained in force, and under it he lawfully held the office. The legal right to the office carried with it the right to the salary. The Board, by its wrongful act, could not deprive him of his legal right. The right of a public officer to the salary of his office is a right created by law, is incident to the office and not the creature of contract, nor dependent upon the fact or value of services actually rendered. (Citing cases from several states.)"

In this case it is interesting to note that by the charter of the City of St. Louis it was provided that policemen could only be removed for cause and after hearing, containing provisions identical with the charter of the City of Chicago. The case just above cited was followed in the case of *Gracey* v. *City of St. Louis*, 213 Mo., 384; 111 Southwestern, 1159, wherein was presented the question whether or not the relator was an officer of the City of St. Louis, and it was decided by the Supreme Court of Missouri that he was, and that court said:

> "It appears, then, that whether our conclusion be drawn from a view of general principles of law, or (more narrowly) be based on a close analysis of the ordinances of this city, we must hold that plaintiff was an officer of the City of St. Louis, and this although the word 'employ' is used in Section 2197."

In the case of *Larsen* v. *City of St. Paul*, 83 Minn., 473; 86 Northwestern, 459, the Supreme Court of Minnesota said (86 Northwestern, 460):

> "There was nothing in the act which looked towards relieving men already on the force, but who would be ineligible to appointment because lacking as to one or more of the enumerated requisites, so the fact might be that men holding these offices at the time of the enactment of the law, and not possessing any of the requirements required thereby, would still continue on duty, and over men who were qualified, but who were not appointed until after the law went into effect. This, in time, would work out in accordance with the spirit of the act. Men of experience and mature years would be appointed to positions as officers, and in the future men who did not possess these special requirements would be ineligible to appointment in the ranks; the result being that, without any serious disturbance in public matters, and without detriment to the service, it would be but a few years before all of the officers, as well as the men, would possess the required qualifications."

In this case it is also decided that the fact appearing that the Mayor of the City of St. Paul had appointed the policeman, the consent of the council was sufficiently indicated by its approving the monthly pay-rolls over a period of years and that no direct action was required. In other words, it was not considered fatal to the policeman's claim that the council had not passed a specific ordinance, so long as it clearly appeared that the council had approved the pay-roll containing his name and thus established its acquiescence.

In the case of *Emmitt* v. *Mayor, etc., of New York*,

128 New York, 117, the unanimous opinion of the New York Court of Appeals is in part as follows (page 120):

> "The office of inspector being one created by the act [Civil Service Act] when filled, the incumbent became more than a mere ordinary employe, or laborer. Besides, it appears that his candidacy for the office must have been certified by a certificate from the Civil Service Commission and his qualifications further certified to by at least three of the aqueduct commissioners. Such an employe upon the work cannot be classified, or regarded, as a temporary or occasional laborer. He fills an office with certain more or less important responsibilities attached to it."

In the case of *State* v. *Wyman*, 71 Ohio St., 1, a petition in *quo warranto* was filed, by the Attorney General of Ohio, to oust the defendant from the office of Chief of Police, of the City of East Liverpool, in that state. The Supreme Court of Ohio ordered the petition dismissed, and in the course of the opinion uses the following language (page 8):

> "The offices, employment and places so classified by the said board of public safety shall constitute the classified service of the department of said city, and no appointments to such places shall be made except under and according to the rules hereinafter mentioned. Immediately upon the classification of such department, such board shall furnish to the Mayor a list of all offices, employment and places in any way connected with such department within said classified service, with the names of the incumbents, their compensation and the nature of their duties; and said board shall from time to time promptly furnish to the said Mayor in writing at his request all other information de-

sired by him for the proper fulfillment of his duties. Section 162 provides for the examination of all applicants for offices or places of employment in such classified service. * * *

"It seems to have been the purpose of the Legislature in the enactment of the code, so far as possible, to provide that officers and employees in the police and fire departments, in office when the new code went into effect, should not be disturbed in their office or employment, and that thereafter these departments should be under the so-called merit system, and that appointments thereto could be made only in the manner provided by the code. * * * It is not difficult to understand why the Legislature, in adopting the merit system, should provide that those already in office might remain without examination, but it does not appear why it also should be provided that a vacancy in the highest office could be filled only from their number. * * * The provision of Section 158 is not that the names of the incumbents shall comprise a classified list, but that the board shall furnish the Mayor a list of the offices and employments within the classified service, and then in order that the persons in office or employment in these departments at the time the new code went into effect, may not be disturbed, it is further provided that the board shall accompany the list with the names of the incumbents; and the reason for the provision in Section 149, that the Chief of Police shall be appointed from the classified list of such department, is that there may not be any doubt of the legislative intent that that office also shall be under the merit system, and that appointees thereto, other than those in office at the time the code takes effect, shall be required to be selected by examination. That section provides that the police department shall be composed of a Chief of Police, and such other officers as may be provided by ordinance

> of council, and it well might be contended that it was not necessary for council to provide by ordinance for the office of Chief of Police, that such office was provided for by the statute itself, and that, therefore, that office would not necessarily come under the merit system."

In the case of *Eckloff* v. *District of Columbia*, 135 U. S., 240, the plaintiff in error was removed from the police force by the commissioners of the district without any written charges preferred against him, or any notice or hearing. The single question presented was as to the power of the commissioners to so remove a police officer and the justification for such action was found in an act of Congress which placed the police force under the control of said commissioners and empowered them

> "To abolish any office, to consolidate two or more offices, reduce the number of employees, remove from office and make appointments to any office under them authorized by law."

This court held in that case that this general language gave full and complete powers of removal, and in the course of the opinion it is said:

> "The power to remove is a power without limitations. The power is granted in general terms, as well as the authority to adopt such provisions as may be necessary to carry it into execution. Full authority is given to the commission; and in the absence of rules and regulations directing a definite procedure, its act of summary dismissal cannot be challenged."

This case is another instance of the necessity for positive provisions of law to permit removals without notice and hearing. It is needless to say that

if statutory warrant had not been found in the act of Congress, providing a permanent government for the District of Columbia, this court would not have held that the removal was legal. In the case at bar there is no statutory warrant for the removal of the relator, and in the absence of such clear, positive and mandatory enactment he was entitled to notice and hearing under the Constitution. Again we wish to emphasize that the error into which the state court has fallen is in holding *that the absence of specific mention of the right to have notice and a hearing, from the provisions of the Civil Service Act*, prevented relator from being entitled to notice and hearing, whereas the law is that these rights must be granted to him unless by positive enactment they are taken away, as said by Chief Justice Marshall, "under the mandate of positive law." The Civil Service Act clearly repealed all former laws on the same subject, as was decided in the state court in *The People* v. *Kipley*, 171 Illinois, 44. There was, therefore, no statutory warrant for the summary removal of relator at the time such removal was attempted by the Superintendent of Police.

By the terms of the Civil Service Act, relator was entitled to notice and hearing and could only be removed or discharged for cause. The language of the statute is as follows:

> "§12. No officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense."

This language means to include all within the classification, since, by the terms of Section 3 the offices and places of employment so classified are made the classified civil service of the city. The words "who shall have been appointed under said rules and after said examination," do not amplify or limit the words preceding them, but are meant to describe (a) those who shall have been appointed and (b) those who have passed the examination. The language of Section 3 is prospective in operation, since there is no intent evidenced to abolish any offices or place of employment. Furthermore, the "uniformed police" are classified as officers under Division "D" of Class "A". Relator was, therefore one of the classified civil service. Section 12 regulated his removal by express terms, so clear and plain that this conclusion is irresistible. The word "shall" refers to the future and cannot have any application to the officers holding their positions when the act was adopted. This is the only construction that will render the rules of the commission and the statute of the state harmonious.

That "examinations" and "appointments" were not contemplated by the act as necessary to be made, after the adoption of the act by the City of Chicago, before the police force of the city would be entitled to the protection afforded by the act, is manifest not only from the words of the act, *but also from the necessities of the case.* If the contention of counsel for the city, that no policeman is entitled to the protection of the Civil Service Act until he has been "appointed" after the examination provided by the act, and that until such ap-

pointment is made, any *one* or *all* of the police force may be *summarily discharged* at the pleasure of the Superintendent of Police, what protection would the city have from the danger incident to a discharge by such official, immediately upon the adoption of the Civil Service Act, for political reasons, of the *entire* police force, instead of being content, as he was, with the discharge of a *few hundred* only?

The act contemplated that, after its adoption by the city, civil service commissioners should be appointed by the mayor; and that after the commissioners had been appointed they should make *rules* for the examination of those seeking appointment upon the police force; and that such examinations should be made, and if an applicant for examination should be found qualified, and a vacancy existed, he might be appointed. This would necessarily take some time, and possibly very much time; for no one could be examined unless they desired to obtain a position on the force, and it would be possible that no one would apply for such position for weeks and even months; and can it be supposed for a moment that the Legislature contemplated that the City of Chicago was to be without its necessary police force until there should be found two or three thousand persons who not only *desired* to take the prescribed examination, but who should be found *qualified* and could succeed in having themselves "appointed" to the office of policeman? Such result might follow if the untenable claim made by counsel for the city of Chicago (that no one since the adoption of the Civil Service Act can be a policeman of Chicago, entitled to the benefits of the act, unless he

has been "*appointed*" after examination in accordance with the rules adopted by the Civil Service Commission) is held to be sound.

We conclude the matter now under consideration with a few words of general comment upon the Civil Service Act.

This act was adopted by the City of Chicago April 2, 1895, and under the provisions of law the then mayor of the city, on July 1, 1895, issued his proclamation declaring the adoption of said act. It was adopted by an overwhelming vote of the citizens of the City of Chicago. It is a statute in the highest sense remedial in its character. It was aimed at the overthrow of the "spoils system," so-called, which had grown to be an intolerable evil. The very purpose of the act was to bring to an end the use of the public offices of our great municipalities as the "spoils" of political supremacy. Historically, everyone knows that this motive was controlling with the electorate in voting for the adoption of the act. An act which has been so adopted should, pre-eminently, receive such construction by the courts, if not absolutely in conflict with the express provisions of the act itself, as will most completely give effect to the purpose of the act, and the expressed will of the people. There was no purpose on the part of the electorate, when the Civil Service Act was adopted, and became the law of the municipality of Chicago, with reference to the organization and control of its civil service, that the power of arbitrary removal of faithful, efficient, tried "holdovers" should remain as a weapon in the hands of politicians for the furtherance

of their purposes, or the discharge of their political obligations. This is historically certain. But it is equally certain from an inspection of the act itself, that the act had no such purpose in contemplation; on the contrary, the very object of the act was to forever end the system which had become a stench in the nostrils of honest people, and a growing menace to the efficiency and perpetuity of our institutions. As was said by Judge Tuley in the *Ptacek* case:

> "Not only in this city, but in all large cities of the United States, the politicians have shown antagonism to all Civil Service laws. This is the people's law and not the politicians'; and unless those chosen to enforce it shall enforce it in its spirit and letter, it will soon become another of the many cases where the people have attempted to reform evils in Civil Service and failed in their efforts to do so."

It was held by this court in *Garfield v. United States*, 211 U. S., 249, as follows:

> "It has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard. The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded is of the essence of due process of law."

To the same effect is the more recent case of *United States ex rel. Turner v. Fisher*, 222 U. S., 204. There can be no doubt that the Civil Service Commission was authorized and empowered by the Legislature of Illinois to classify all offices and places of employment in the City of Chicago and

that such offices and places of employment should constitute the Classified Service of said city; that acting under and by virtue of said act, the commissioners appointed by the Mayor of said city did classify the offices and places of employment therein; that by such classification Class "A" was known as the Official Service and that Division "D" thereunder was the Police Service, consisting of all persons in the uniformed police force; that such offices were made up into what is known as the Civil List, and that the city was unauthorized to make payment to anyone not appearing upon said list. The allegations of the petition, admitted as true by the general demurrer, show that relator was one of the uniformed police in the City of Chicago at the time of the adoption of said act, was classified thereunder, his name was placed upon the official "Civil Service List," this list was certified and he was paid for several years by the City of Chicago. By this "administrative proceeding" did not relator acquire any rights? If he did, he has been deprived of them without due process of law, because no notice of any charges were ever preferred or made known to him and he was given absolutely no opportunity of being heard in his defense.

We have indicated by reference to the report of the Civil Service Commission that the act was founded substantially upon the Federal Civil Service Act and decisions with reference to such act will be of interest and instructive in deciding the matter now before this court.

This court decided in the case of *United States v. Wickersham*, 201 U. S., 390, that a stenographer

in the land office in Idaho, though perhaps not technically an officer of the United States, with a fixed term and compensation, was nevertheless entitled to the protection and benefit of an order of the President of the United States governing removals where the facts showed that the Secretary of Interior had certified his name to the Civil Service Commission as an employe in the office of the surveyor-general, within the terms of the statutes and the executive order. We quote the following from the opinion in that case (page 397):

> "On September 26, 1896, under the extension order referred to and the action of the Secretary of the Interior, the Acting Secretary of the Interior filed a list of positions and employes with the Civil Service Commission, which, among others, in the list of employes in the offices of surveyors-general, contained the name of the appellee as a stenographer and typewriter, the date of his appointment, salary and residence, as stated in the findings of fact. By the action recited on the part of the President and the head of the Department of the Interior, Wickersham was brought within the protection of the law and the President's order afforded to persons duly entered in the classified Civil Service. **While he may not technically have been an officer of the United States with a fixed term and compensation, he certainly was within the subordinate places provided for in the statute, and within the 'employes outside the District of Columbia,' covered by the President's order of May 6, 1896. That order expressly included officers and employes, whether compensated by a fixed salary or otherwise, serving in a clerical capacity or whose duties were in whole or in part of a clerical nature. The Secretary of the Interior certified the name of the claimant to the Civil Serv-**

ice Commission as an employe in the office of the surveyor-general, within the terms of the statutes and the Executive order. He was therefore entitled to the protection of the President's order of July 27, 1897 (14 Ann. Rep. Civ. Serv. Comm., 133); 'no removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.'

"If the contention of the Government be correct and the attempted suspension by the surveyor-general was equivalent to a dismissal from office, such action would run counter to the requirements of the Presidential order just quoted. The action of the surveyor-general was not upon written charges, and no notice or opportunity to make defense was given to the accused, as provided in that order. The appellee being entitled to the protection of this order, and to have notice of the charges preferred, and an opportunity to make defense, the attempted removal, if such it was, was without legal effect; nor can we find any authority, statutory or otherwise, authorizing the suspension in the manner undertaken in this case."

II.

We contend that the office of Police Patrolman, in the Police Department of the City of Chicago, was created by act of the Legislature, revising the charter of Chicago in 1863, and that the office was not abolished by the cities and villages act, and the reorganization of the municipality of Chicago under that act.

In the case of *Stott* v. *City of Chicago*, 205 Illinois, 281, the Supreme Court of Illinois, in discussing the sufficiency of the allegation of the petition, that relator was "duly appointed" a police patrolman (page 290), said:

> "*If the office of police patrolman had been one provided by statute or some general law of which it was the duty of the court to take judicial notice*, then there is authority for holding that the word 'duly' means in a regular and legal manner, or as said in some of the cases, 'in the proper way; regularly; according to law;' * * * It may be *if appellant were an officer of the city or of* the county whose election or appointment is expressly provided for by *statute*, that the allegation that he was duly appointed might be regarded as sufficient by the courts."

The court, by the use of the words italicized in the above quotation, as also by other portions of the opinion, evidently had *overlooked the fact* that the office of police patrolman had been created by direct legislative action.

The *original charter* of Chicago (Laws of Illinois passed at the session of the Legislature ending March 6, 1837), recognizes the existence of a police force in said city, and the *Common Council*, by paragraph 30 of Sec. 28 of the charter, were given power "to regulate the police of said city." Such police were by said original charter called *police constables*.

The act to *revise* the charter, approved February 13, 1863, which act was expresly declared to be a *public act* (Sec. 13, Chap. 17), not only recognized the police force in said city theretofore existing, but

established an "*executive department* of the municipal government of said city to be known as the Board of Police," which board was given "the entire control of the *police force* of said city," etc. Not only was the police force of the city recognized, and the control thereof vested in a Board of Police, but the act provided in terms what officers should constitute the force, to-wit:

> "The said police force shall consist of a superintendent of police, three captains of police, six sergeants, *ninety police patrolmen*, and as many *more* police patrolmen, sergeants and deputy superintendents as may be authorized by the common council on the application of the board. *The several offices hereby created* shall be severally filled by appointment," etc.
>
> See Chap. 10 of said Act (Laws of 1863, p. 109).

The charter was again revised by an act, approved February 16, 1865, which act was also declared to be a *public act*. This act may be found in Vol. 1 of Laws of 1865, commencing at page 284. This act, as did the original charter, and the revision of 1863, recognized the existence of the police force and of the Board of Police, and fixed the salaries of the various officers composing said force. By this revision (Sec. 15, p. 288) the Legislature declared:

> "That said force shall consist of a general superintendent of police, one deputy superintendent of police, three captains of police, sergeants of police not exceeding twelve, and as many police patrolmen, not exceeding two hundred, as may be authorized by the Common Council," etc.

The acts of the Legislature above referred to show very clearly that the City of Chicago had, from *the beginning of its existence as a municipality*, a police force—the various offices in which force were created by the direct action of the *Legislature* itself.

In the case of *Bullis* v. *City of Chicago*, 235 Illinois, 472 (an assumpsit suit decided against the plaintiff because a resolution of the Council was held not an ordinance), the Supreme Court of Illinois goes further than the court had theretofore gone and in terms (page 476) holds:

> "Until the City Council did provide for the appointment of patrolmen, the provisions of the city charter having been superseded by those of the general law, **there was no such office as patrolman.**"

In the opinion (page 474) preceding the above quotation, there is an admission that by *the provisions of the city charter* there *was* such an office as patrolman. It is, however, assumed that such office ceased to exist upon the adoption, by the people of Chicago, of the Cities and Villages Act, because, as the court says, the provisions of the charter were "*superseded*" by those of the general law.

In this assumption we believe the court has erred. The adoption of the Cities and Villages Act was not designed to, and did not, supersede all prior acts of the Legislature pertaining to the municipality. On the contrary, the Cities and Villages Act expressly provides (Section 6, Article 1), that

> "*All laws and parts of laws, not inconsistent* with the provisions of this act, *shall continue in*

> *force and applicable to any such city* or village, the SAME AS IF SUCH CHANGE OF ORGANIZATION HAD NOT TAKEN PLACE."

Is a law *creating* a *police force* in the City of Chicago "inconsistent" with the provisions of the Cities and Villages Act? Manifestly not, for the Cities and Villages Act itself *recognizes the existence* of a police force, and confers upon the City Council power "*to regulate the police* of the city," and power "to prescribe the duties and powers of a *superintendent of police, policemen and watchmen.*"

The *creation* of the office of superintendent of police and policemen had been performed by the Legislature by its direct act, as we have already seen; hence, when the Cities and Villages Act refers to the police force and the *power* of the City Council *in connection therewith*, no power is conferred upon the Council to *create* the office of policeman, but there was conferred simply power to *regulate* the force which *had been* created, and to prescribe the *duties* of such force.

As was said by the Supreme Court of Indiana in *Roth et al. v. State of Indiana*, 158 Indiana, 243; 63 Northeastern Rep., 460:

> "To *create an office*, and merely to provide for *filling the same*, or for *regulating* the *duties* or *functions* thereof, are quite different. As affirmed by the authorities, the word 'create' has a clear, well-settled and well-understood signification. It means to bring into existence something which does not exist."

The Legislature by its direct action *created* the office of policeman, as shown by the acts hereinbefore referred to; and by the Cities and Villages Act the Legislature empowered the City Council to regulate the conduct of those who should hold such office. These acts, so far as the *office* in question is concerned, are, as we have seen, in no sense *inconsistent*, and hence the former acts, *creating* the office of policeman in the City of Chicago, are still in force, and such an *office* does exist independently of action by the City Council.

Additional force is given to this construction of the statute by the peculiar wording of the clause of the Cities and Villages Act, conferring power upon the City Council in respect to police matters. The power conferred is "*to regulate the police*"—not power to regulate the *members of a police force*, should the Council see fit to *create* such force at some future time—but power to regulate *the* police force. This *specific* reference to "*the* police" of the city necessarily implies that the Legislature understood that there was *then existing* in the City of Chicago *a department of the municipal government known as the department of police* embracing officers commonly known as superintendent of police, captains of police, lieutenants, sergeants and police patrolmen—and *those* officers the City Council was empowered to *regulate*.

But it is said that by Section 2 of Article VI of the Cities and Villages Act, the City Council was given power to provide for the election by the legal voters of the city, or the appointment by the Mayor of certain specific officers, "*and such other officers*

as may by said Council be deemed necessary or expedient"—and it is *assumed*, by the state court, that the phrase "*other officers*" referred to in this provision of the act refers to *police* officers, and, hence, it was held by that court that until the City Council does provide for the *election* or *appointment* of *police* officers, no such office or officer has any existence in the City of Chicago.

In giving this construction to the statute in question we believe the state court has erred.

That the "laws and parts of laws" pertaining to the police force in the City of Chicago, to which we have referred (the original charter of the city and the revisions thereof enacted in 1863 and 1865), are not "*inconsistent*" with the power to provide for the election or appointment of the "*other officers*," conferred by said Section 2 of Article VI, certainly does not appear *upon the face* of the provision in question. It is not stated in said Section 2 *what* officers are to be included in the term "such other officers"; but inasmuch as the Legislature had already *created* a *police* force for the City of Chicago, and had by earlier provisions of the Cities and Villages Act provided that the acts creating such police force, if not "*inconsistent*" with the Cities and Villages Act, should "*continue in force and applicable* to" the City of Chicago, "*the same as if such change of organization had not taken place*"; and inasmuch as the Legislature, by the Cities and Villages Act itself, had, by a section of said act, placed earlier in the act than said Section 2, recognized *the* police force theretofore created as still in existence, and had conferred upon the City

Council power to regulate such force—is the assumption that the "*other officers*," referred to in Section 2, were *police* officers, warranted? And is the assumption warranted, that the provision of Section 2, conferring power upon the City Council to provide for the election or appointment of such "*other officers*," is "*inconsistent*" with the prior laws of the Legislature *creating* "*the police*" of said city, and for that reason such prior laws are superseded?

As has been before said, it was held by the state court that until the City Council takes action under the authority conferred upon it by said Section 2, and provides for the *election* or *appointment* of policemen, no such office or officer exists in the City of Chicago.

Let us consider the *effect* of this construction thus given to the provision of Section 2, now under consideration.

First: The adoption by the people of the city of Chicago, of the act in question, would at once wipe out and destroy all action of the Legislature theretofore taken for the protection of the people of that part of the state residing in Chicago, and of the people of this state, and other states, who might have occasion to visit Chicago.

Second: The adoption of the act would make the matter of providing such protection, at any time in the future, dependent upon the "discretion" of the City Council—dependent upon whether or not such City Council should *deem such protection* "*necessary*."

Third: The City Council, if it should at any time

deem such police protection necessary, and provide for the election or appointment of *police* officers, it might "*discontinue* any office so created."

The Legislature in 1863, acting in the interest and for the protection of the people of the state, thought it necessary to secure police protection for them, and, to that end, it provided that—

> "The police force [of the City of Chicago] *shall* consist of a superintendent of police, three captains of police, six sergeants, ninety police patrolmen, and *as many more* police patrolmen, sergeants and deputy superintendents as may be authorized by the Common Council."

Later, in 1865, the Legislature, for the further protection of the people, in some respects, increased this force.

Now it is insisted that by the adoption of the Cities and Villages Act, by the people of Chicago, all police protection theretofore provided for the people of the city and state, by the Legislature, *eo instanti*, ceased to have an existence, and the people of the city and state were to be thenceforth dependent upon the "discretion" of the City Council to create a police force which it might or might not create—as it might or might not deem such police force "necessary or expedient." And it necessarily follows, that if such *City Council* should deem it *unnecessary* to have *any* police protection at all, the people would be remediless in the premises, inasmuch as the power to provide such police protection was not by the act made *obligatory* upon the City Council, but rested solely on the "discretion" of the City Council, there being, in such

case, no power in the courts to coerce the City Council into providing for such police force. And should the City Council, at any time in the future, become so unmindful or indifferent to the necessities of the people for police protection as to neglect or refuse to provide for the election or appointment of a police force in said city, it is not apparent to us, if this construction of Section 2 is to be adhered to, that the people would have any remedy, in the law, for such want of action by the City Council in the premises, but would be obliged to resort to *force* to compel the Council to *create* the office of policeman, and provide proper police protection.

We respectfully insist that the office of policeman in the city of Chicago, after as well as before the act of the Legislature, passed prior to the Cities and Villages Act, and continued in force by that act, still existed, and that any construction of said Section 2 which would give to that section the effect of repealing or superseding prior laws creating and continuing a police force in the city of Chicago, after as well as before the reorganization of said municipality under the Cities and Villages Act, *must* be erroneous.

In passing upon the contention which we have now made as to the effect of Section 2, as repealing or superseding the prior laws and parts of laws *creating a police force in the city of Chicago*, and the continuance in existence of such force after the adoption of the Cities and Villages Act, we trust that this court will not only consider the suggestions made, but will bear in mind that statutes are not repealed by *implication*, unless such implication is

so clear as to make it *certain* that it was the intention of the Legislature that the prior act should be repealed by the later one.

Upon this branch of the argument, we will conclude by making a single statement of *fact* (one which cannot be successfully denied by the attorney or counsel for the city of Chicago), and a statement of law based upon that fact. The statement of fact is this: *The City Council of the City of Chicago has never passed any ordinance creating the office of a police patrolman in said city.* The statement of law is this: *If the views of the state court are correct, there is not a police patrolman de jure in the City of Chicago to-day; and there being no such office as police patrolman, there is not a police patrolman de facto in the City of Chicago to-day—and the city* is left, and now is entirely without *legal* official police protection—the only protection it has being by employed individuals, possessing no *official* power or authority whatever.

If we are correct in our position that the "other officers" referred to in Section 2 of Article VI of the Cities and Villages Act are not officers of police, but that the police force in the City of Chicago was provided for by a prior act of the Legislature, and that said prior act, so far as related to the police, was by the express provisions of Section 6 of Article I of the Cities and Villages Act continued in force, it necessarily follows that the provisions of such prior act prescribing the *term of office* of the incumbents of the office thereby created were carried forward and continued with the continuance of

the office under the reorganization of the municipality.

Referring to the revision of the charter of the city of Chicago, made in 1863, we find that the Legislature provided that the several persons composing the police force created by said revised charter should hold office "during such time as he shall faithfully observe and execute all rules and regulations of said boards and the laws of the state and ordinances of the city." By the further revision of the charter, made in 1865, it was also provided that "each patrolman, as well as each sergeant, so appointed, shall hold office only during such time as he shall faithfully observe and execute all the rules and regulations of the board, the laws of the state and ordinances of the city." By said revisions, respectively, it was provided that:

> "No person shall be removed therefrom [the police force] except upon *written charges* preferred against him to the Board of Police, and *after* an *opportunity* shall have been afforded him of being *heard* in his defense."

It is suggestive to notice that by the terms of the original charter of the city of Chicago, in force March 4, 1837, it was provided that the common council should have power not only "to *regulate* the police of said city," but power to "*remove* all such persons or officers *at pleasure*." But the Legislature, as we have already seen, in revising the charter in 1863, deemed it wise to take from the council the power of *summary removal* theretofore vested in it, and to provide that each member of the police force should hold office "during such time as he shall

faithfully observe and execute all the rules and regulations of said board, *the laws of the state* and the ordinances of the city."

By Section 2 of Article VI of the Cities and Villages Act, power was conferred upon the City Council to "discontinue," at the end of any fiscal year, the offices which by said section the council was empowered to *create*. Is it to be presumed that the Legislature intended to empower the city council to *discontinue* the office of policeman, an office which the Legislature itself had not only created, but the *term* of which office it had fixed, *not in years*, but for *such period* as the incumbent should "faithfully observe and execute the rules and regulations of the board, the laws of the state and the ordinances of the city"? If such presumption is unsound, then we cannot *presume* that the "other officers" referred to in said section was intended to include the officers of the police force.

By Section 3 of said Article VI the method of appointment of certain officers is provided for, and the *city council* is *empowered* to fix the *term of office* of "all such officers," *provided* that such term shall not exceed two years. Is it to be presumed that by "all such officers" the Legislature meant to include police officers? To warrant such presumption we must not only hold that the prior acts of the Legislature creating the office of policeman in the city of Chicago were repealed, but we must also hold that the policy of the law in respect to the removal of police officers from their office as viewed and expressed by the Legislature in revising the charter of the city of Chicago in 1863 and 1865, had so changed

during the seven years following 1865, as to induce the Legislature in 1872 to empower the city council not only to limit the term of office of policeman to any period less than two years, however short that period might be, but to empower the city council to "discontinue" the office altogether, so that such discontinuance was made at the end of any fiscal year.

It will not be contended that an *intention* on the part of the Legislature to legislate in a certain way upon any given subject, has the force of a legislative enactment, even though such intention to legislate is manifest from acts actually passed, unless it does *in fact* pass an act containing apt words to express the intention. In other words, even though we may believe the Legislature *intended* to enact certain laws, yet if it *did not* enact the law intended, the *intention to legislate* in a certain way cannot be taken *as an enacted law*. This court will look in vain for any provision in the Cities and Villages Act limiting the term of office of a policeman in the city of Chicago.

We have before stated that the City Council of Chicago has never by ordinance attempted to *create* the office of policeman; and we now state without fear of contradiction that the City Council of Chicago has never attempted, by ordinance or otherwise, to fix the *term of office* of a police patrolman.

In the case of *Brennan et al.* v. *The People ex rel. Kraus et al.*, 176 Illinois, 620, the court, speaking through Mr. Chief Justice Carter, beginning at page 625 thereof, said:

> "It is conceded, and is clearly true, that when the city was under the special charter, enacted,

approved and in force February 13, 1863 (Private Laws of 1863, p. 40), the Board of Education was one of the departments of the city government; but the position of appellant is, that substantially all of the provisions relating to schools in the Act of 1863, and subsequent amendments, were repealed by the General School Laws of 1872 (Laws of 1871-72), and 1889. (Laws of 1889, p. 239.) In 1875 the City of Chicago became incorporated under the general law for the incorporation of cities and villages, and its special charter is no longer in force, except so much of it as is not inconsistent with the general law. It is provided in Section 6 of Article 1 of said General Law (Laws of 1871-72, p. 218; 1 Starr & Cur. Stat., 454), that 'all laws or parts of laws not inconsistent with the provisions of this act shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place.' Now, the general law for the incorporation of cities and villages contained no provision whatever relating to schools. [**Neither did the said law for the incorporation of cities and villages contain, nor does it contain, any provision whatever relating to the police department of the City of Chicago.**] It is plain, therefore, that its adoption by the City of Chicago did not abrogate any of the provisions of its special charter relative to schools. [**It did not abrogate any of its special charter relative to the police department of the City of Chicago.**] * * * It is not contended that they were **expressly repealed, but by implication only**, as being inconsistent with such general laws. **We are of the opinion that the repealing sections of the Acts of 1872 and 1889**, and the language used in other sections of the **acts, indicate an intention not to repeal any parts of the special acts except such as were inconsistent with the general acts.** The language of

said sections, after naming the statutes repealed, is: 'And all other acts and parts of acts inconsistent with this act, and all general school laws of this state, are hereby repealed. * * * It does not appear to us to be necessary in this case for us to assume the labor suggested by counsel, but in addition to what has already been said it seems to us sufficient to say * * * that the school law of 1872 did not create the Board of Education of Chicago, but recognized its then present existence.' [**Said general law for the incorporation of cities and villages, 1872, adopted by the City of Chicago in 1875, did not create the department of police in said City of Chicago, but recognized its present existence.**]"

In the case of *City of East St. Louis* v. *Maxwell*, 99 Ill., 439, at page 444 thereof, the court, speaking by Mr. Justice Craig, said:

> "The Act of 1872 is a statute of a general nature, and such statutes do not repeal by implication, charters and special acts passed for the benefit of particular municipalities. (Dillon on Municipal Corporations, Sec. 54.)
>
> "*Town of Ottawa* v. *County of La Salle*, 12 Ill., 340, is an authority in point on the question involved. It was there held, that a subsequent law which is general, does not abrogate a former one which is special. Nor does a general law operate as a repeal of a special law on the same subject."

In the case of *Gunnarshon* v. *City of Sterling*, 92 Ill., 569, at page 573 thereof, the court, speaking by Mr. Justice Scholfield, said:

> "The rule is, a subsequent statute which is general does not abrogate a former statute which is particular."

Furthermore, it is our contention that, as to the question now before the court, to-wit: The provision in the charter of 1865, "*That no person shall be removed therefrom, except upon written charges preferred against him by the Board of Police, and after an opportunity shall have been afforded him of being heard in his defense,*" it is not inconsistent with any provision found in the City and Village Act, but that the inconsistency, if any there be, is between the above quotation from the charter of 1865 *and an ordinance of the City of Chicago, passed in 1881.* It certainly cannot be urged with any hope of success that a special statute is repealed by an inconsistent city ordinance. And, furthermore, how could the Supreme Court of Illinois take judicial notice of an ordinance which was not pleaded? The situation being as we have heretofore stated, that the hearing was upon demurrer, no one will have the temerity to say that any such alleged inconsistency appears from the allegations of relator's petition. The Legislature of Illinois, in 1865, saw fit to include the above quoted provision in the charter of the city of Chicago of 1863. This provision is again found in the Civil Service Act of the same Legislature passed in 1895, and there is nothing inconsistent therewith in the City and Village Act of 1872, adopted by the city of Chicago, in 1875. There is not one word inconsistent with the language above quoted. And what plausible argument can be made that the State of Illinois ever intended that policemen could be removed from the police force without notice and a hearing in their defense? We say again with con-

fidence that whatever regulations the City Council of Chicago may have made, there was no power in that body to do away with the proviso in the Act of 1865. This, to our mind, is so clear that this court is justified in so holding, irrespective of the fact that the state court has arrived at a different conclusion, as has been held by the decisions of this court. By the terms of the City and Village Act, all laws *and parts of laws* "not inconsistent with the provisions of that act" should "continue in force and be applicable to any such city or village the same as if such change of organization had not taken place."

III.

In the case at bar the agents of the State of Illinois did not act in accordance with the laws of that state and hence deprived relator of his rights illegally.

This case is distinguishable from cases like *Wilson* v. *North Carolina*, 169 U. S., 586, for this reason. The mere fact that the state court has construed the laws of Illinois, erroneously, as we contend, is no ground for defeating the jurisdiction of this court. It is so palpably erroneous that this court cannot disregard our contentions without working the most manifest injustice. We ask for no reversal of previous decisions by this court, but an adherence to the principles of what has often been decided. If the judgment of the state court can be affirmed in this case, then, we submit, there is no vital force in the Fourteenth Amendment, as a restraint upon

the action of the agents of a state. It is not the policy of this tribunal to overlook the violation of fundamental rights. *Let it be conceded that the laws of Illinois give to relator every right he claims*, then the mere fact that the highest court of the state has decided adversely to his contention cannot defeat the right and duty of this court to determine for itself what are those rights and whether they have been violated. We trust that we have demonstrated that the laws of Illinois do give the rights claimed by relator.

Even if the State of Illinois has the power to enact that police officers can be removed without notice and hearing (a question not necessary for decision in this case), that state has not so provided in its constitution or statutes. The provisions of the Fourteenth Amendment, therefore, require that the fundamental safeguards of citizenship be not denied.

As was said by Chief Justice Marshall, in the case of *Meade* v. *Deputy Marshal*, 1 Brock, 324:

> "It is a principle of natural justice, which courts are never at liberty to dispense with **unless under the mandate of positive law**, that no person shall be condemned unheard or without an opportunity of being heard."

The facts in the petition now before the court present no review of a procedure deemed the equivalent of due process of law, to-wit, notice and hearing. The only possible escape from the conclusions we have urged, presented by our opponents, is that there is no such thing as a policeman in the City of Chicago. This position, we submit, is so untenable that no court would be justified in upholding it. Con-

trast this view with our contention—that relator acquired rights under the Civil Service Act and the classification and certification thereunder, and is entitled to notice and hearing as to those rights before they are arbitrarily and ruthlessly taken from him, within the shadow of an enlightened civil reform statute. Can these things be done without violating the Federal Constitution? Never, we submit, so long as there exists the power in this court to review such action.

There is nothing in the Civil Service Act to warrant any such conclusion. The sole justification is that such statute does not in express terms provide these fundamental safeguards. The point is that such statute does not attempt to take away these rights. Where is the mandate of positive law requiring it?

In *Yick Wo v. Hopkins*, 118 U. S., 356, after stating that judicial propriety is best served by accepting the judgment of the state court as to the illegality of the imprisonment of the petitioner, this court said (page 366):

> "That, however, does not preclude this court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; for the determination of the question, whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

And this court immediately proceeded to differ from the state court upon the real meaning of the ordinances in question. In the case at bar we have statutes instead of ordinances, but the real meaning is no less clear and distinct. There is nothing in this case to prevent this court from putting an independent construction upon these statutes.

In the course of the opinion in the case just cited we find the following language (page 373):

> "Whatever may have been the intent of the ordinances as adopted they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioner, as to all other persons, by the good and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S., 259; *Chy Lung* v. *Freeman*, 92 U. S., 275; *Ex parte Virginia*, 100 U. S., 339; *Neal* v. *Delaware*, 103 U. S., 370; and *Soon Hing* v. *Crowley*, 113 U. S., 703."

IV.

Plaintiff in error was deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen.

As we have said, there is nothing in *Wilson* v. *North Carolina*, *supra*, that militates against our contentions. In that case this statement, from the case of *Allen* v. *Georgia*, 166 U. S., 138, 140, is quoted with approval, as it is likewise quoted in *Hovey* v. *Elliott*, 167 U. S., 409, 443:

> "To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that if the Supreme Court of a state had acted in consonance with the constitutional laws of a state and its own procedure it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

But we must bear in mind that in the Wilson case a hearing was provided the plaintiff in error. It is said, therein, after reviewing *Kennard* v. *Louisiana*, 92 U. S., 480, and *Foster* v. *Kansas*, 112 U. S., 201, as follows:

> "Neither case gives any support to the claim that such a hearing as was given in this case would be insufficient under the Fourteenth Amendment."

At the conclusion of the opinion it is said:

> "The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain the party aggrieved would be deprived of his life, liberty or property, in violation of the provisions of the Federal Constitution."

The case at bar is not a proceeding in *quo warranto*, nor is it based upon the claim that the state government in Illinois is not republican in form. Relator raises no political question—he has had unpleasant experience with politics. *But he does show, in our opinion, "a departure from the fundamental principles upon which our government is based."*

It is valuable in this connection to trace the further development of the principles above mentioned, in the decisions of this court, after the *Wilson* case. The result of our examination and research has developed that nowhere has this court ever given its approval to an administrative or judicial proceeding which denied fundamental rights.

In the case of *Louisville and Nashville Railroad Company* v. *Schmidt*, 177 U. S., 230, this court, on page 236 thereof, after referring to the familiar rule that the Federal Constitution does not require any particular form of procedure in the states and

does not give the power to regulate such procedure, the statement is made that "sufficient notice and opportunity to defend" are required in any method of procedure if it shall furnish due process of law. We have no hesitation in saying that, in our opinion, the *Wilson* case could not have been decided as it was, if this court had not considered that the notice and hearing therein provided was sufficient. The opinion, by Mr. Justice Peckham, in the *Wilson* case clearly indicates this. In this connection it is interesting to compare the dissenting opinions of Mr. Justice Brewer and Mr. Justice Harlan in the case of *Taylor* v. *Beckham*, 178 U. S., 548, 582, 596, 597.

In *Iowa Central Railroad Company* v. *Iowa*, 160 U. S., 389, decided before the *Wilson* case, this court stated (page 393), after considering the state procedure therein presented, that the same satisfied the requirements of the Feedral Constitution:

> "Provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

This language is cited with approval in *Cincinnati Street Railway Company* v. *Snell*, 193 U. S., 30, 37.

In the case of *Rogers* v. *Peck*, 199 U. S., 425, 435, after stating that the state need not provide a jury trial, or furnish an appeal, this court said:

> [The Fourteenth Amendment.] "Does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and adequate opportunity to defend himself in the prosecution."

We have alluded and referred to the *Wilson* case on the one hand and *Yick Wo* v. *Hopkins*, *supra*, on the other hand, as being characteristic of each side of the question, and, in our opinion, the case at bar falls in the same category with the arbitrary action condemned in the case of the poor Chinese laundryman, rather than in that of the Railroad Commissioner, who had been removed by the Governor of a sovereign state, strictly in accordance with the statutory law of his state, and then, too, his action was subject to confirmation by the Legislature itself.

Another illustrative case is that of *Simon* v. *Craft*, 182 U. S., 427, 437, wherein this court has said:

> "But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceeding in which notice is given of the claim asserted and an opportunity afforded to defend against it."

To conclude this part of our argument, we quote from the very recent decision of this court in the case of *Jordan* v. *Massachusetts*, 225 U. S., 167:

> "Subject to the requirement of due process of law, the states are under no restriction as to their method of procedure in the administration of public justice. That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned. 'Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law * * * this court has, up to this time, sustained all state laws, statutory or judicially declared,

> regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law.' *Twining* v. *New Jersey*, 211 U. S., 78."

Near the end of the opinion in this case is the following:

> "When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a state over its method of procedure is substantially unrestricted by the due process clause of the Constitution."

There are limits beyond which the state courts cannot go in adjudicating as to the rights of its citizens, and in this connection the following cases are authoritative:

> *Chicago, Burlington, etc., Railroad* v. *Chicago*, 166 U. S., 226.
>
> *Fayerweather* v. *Ritch*, 195 U. S., 276, 297.
>
> *Davidson* v. *New Orleans*, 96 U. S., 97.

This court has often spoken as to what rights are included in the Fourteenth Amendment and what due process of law requires upon the part of the states. Fundamental rights are so uniformly and clearly recognized and enforced in these precincts that we will refer only very briefly to a few expressions of authority bearing thereupon. In the case of *Howard* v. *Kentucky*, 200 U. S., 164, 173, this court said:

> "It may be admitted that the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights. What

those are cannot ever be the cause of much dispute."

It is said in Story on the Constitution (Fourth Edition), Section 1950, in speaking of the terms life, liberty and property, as follows:

> "The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right."
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> * * * * * * * *
>
> "The word, on the other hand, embraces all our liberties—personal, civil and political. None of them are to be taken away, except in accordance with established principles; none can be forfeited, except upon the finding of legal cause, after due inquiry."

In the case of *Butchers' Union Company* v. *Crescent City Company*, 111 U. S., 746, 759, this court said, in speaking of the Fourteenth Amendment:

> "The principal, if not the sole, purpose of its prohibitions is to prevent any arbitrary invasion by state authority of the rights of person and property, and to secure to everyone the right to pursue his happiness unrestrained, except by just, equal and impartial laws."

The scope of the amendment is clearly shown by the decisions of the court in the cases of *Dent* v. *West Virginia*, 129 U. S., 124, and *Allgeyer* v. *Louisiana*, 165 U. S., 578.

We feel safe in saying that this provision in the Federal Constitution prohibits any arbitrary and unjust action by a state, which will result in depriving one of its citizens of his rights without due process

of law or which will operate unequally and oppressively as to him. Many things that are within the power of a state to do, yet cannot be done arbitrarily and without regard to the liberties of the citizen.

V.

Relator was denied the right to share in the Police Pension Fund illegally and without due process of law.

We have heretofore referred to the provision of the police pension fund statute in our brief in opposition to the motion of defendants in error to dismiss the writ of error in this case, and have extracted the pertinent provisions thereof in said brief. The court will pardon the repetition for the sake of clearness and convenience. This statute is found in Hurd's Revised Statutes of Illinois (1912), beginning at page 369, and is in part as follows:

> "Section 1. That in each city, village incorporated towns in this state, having a population of 50,000 inhabitants or more, there shall be set apart the following moneys to constitute a police pension fund:
>
> * * * * * *
>
> *Third.* All moneys paid for special details of *police officers.*
>
> *Fourth.* One per cent per month, which shall *be paid* or deducted from the pension of each and every police pensioner of such city, village or town.
>
> * * * * * *
>
> *Eleventh.* One per cent per month, which shall *be paid or deducted from the salary of each and every member of the police department of such city, village or town; provided, no such*

member shall be compelled to pay more than $1.00 per month from his salary.

* * * * * *

"Section 3. Whenever any person at the time of the taking effect of said act, to which this is an amendment, or thereafter shall be duly appointed and sworn, and have served for the period of twenty years or more upon the regularly constituted police force of such city, village or town of this state, subject to the provisions of this act, or where the combined years of service of any person upon the police force and the fire department, as aforesaid, of such city, village or town of this state, shall aggregate twenty years or more, said board shall order and direct that such person, after becoming fifty years of age and his services on such police force shall have ceased, and all officers entitled to and having a pension under said act, to which this is an amendment, after the taking effect of this act, shall be paid from such fund, a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement; provided, however, the maximum of said pension shall not exceed the sum of $900 and the minimum not less than $600. And after the decease of such member his widow or minor child or children under sixteen years of age, if any survive him, shall be entitled to the pension, provided for in this act, of such a deceased husband or father; but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of said police department after she shall have remarried. *And provided further that all police officers retired after twenty years' service in the police department of such city, village or town, * * * and who are above the age of fifty years now on the police pension rolls shall receive the same pension now*

allowed them. Provided, that in no case shall said pension exceed the sum of $900. (As amended by act approved and in force May 16, 1903.)

"Section 4. *Whenever any person, while serving as a policeman, in any such city, village or town, shall become physically disabled while in and in consequence of the performance of his duties as such policeman, said board shall upon his written request, or without such request, if it deem it for the good of said police force, retire such person from active service, and order and direct that he be paid from said fund a yearly pension not exceeding one-half the amount of the salary attached to the rank which he may have held on said police force at the time of his retirement;* Provided, that the maximum sum of such pension shall not exceed the sum of $900 per year; and the minimum not less than $600; *Provided, further, that whenever such disability shall cease, such pension shall cease.* (As amended by act approved and in force May 16, 1903.)

"Section 5. *No person shall be retired as provided in the next preceding section, or receive any benefits from said fund unless there shall be filed with said board certificates of his disabilities, which certificates shall be subscribed and sworn to by said person and by the police surgeon (if there be one) and two practicing physicians of such city, village or town, and such board may require other evidence of disability before ordering such retirement and the payment aforesaid.*"

Relator paid, each month, out of his salary one per centum thereof to the fund and the city officers having supervision of it. There can be no question that his right to share in the fund, according to the provisions of the statute, is a valuable right and cannot

be arbitrarily taken from him. The statute has not been repealed by the Legislature and is still in full force and effect. Its purpose is evident and needs no explanation. The sole defence made to excuse the ruthless method by which relator was denied a share in this fund is that a pension is a mere gratuity. The Supreme Court of Illinois said nothing as to relator's contention, but seemed satisfied to hold that there were no policemen in the City of Chicago, and of this the court took judicial notice. Yet it stands undenied upon this record that relator paid his money each month for many years and as the time approached to receive the benefits of his contribution, to be retired because of the coming years, he was told that the money which he had earned and paid into the fund, as required by the law, was not for him but for the other members of the police force. It certainly cannot be supposed that the city confiscated or will confiscate the entire fund.

The Police Pension Fund Act, in express terms mentions "police officers" and "policemen," and its provisions are in favor of such officers. The petition sets up that the plaintiff in error is such a police officer and policeman, as is mentioned by the statute, the allegation is well pleaded, and, therefore, admitted by the demurrer interposed on behalf of defendants in error.

We have been successful in discovering that the exact question now before the court was decided by this court in the case of *Pennie* v. *Reis*, 132 U. S., 464, wherein was presented a consideration of the California Police Pension Act. The California statute in that case differs from the statute pleaded in

this case inasmuch as the salary of the policeman in the California Act was fixed by the State as well as the amount to be retained each month for the pension fund, whereas under the Illinois statute, *the policeman is required to pay out of his salary*, one per cent. per month and in no case over three dollars per month, and nothing is said as to the amount of his salary. **In Illinois the salary is fixed by the city.**

Relator was over fifty years of age, in the police service over twenty years, and had acquired an indisputable vested right to his pension under the terms of the statute.

> *Kavanagh* v. *Board, etc.*, 134 California, 150; 66 Pacific Reporter, 36.

Furthermore, there has been no repeal in any way of the provisions of the Illinois Pension Act and the question as to the effect of a repealing statute upon rights not vested is not in this case. At the outset of the opinion, delivered by Mr. Justice Field, (p. 469) it is said:

> "It was contended in the court below that this later Act of March 4, 1889, violated that provision of the Constitution of the United States, and of the State, which declares that no person shall be deprived of his property without due process of law."

And in speaking of the rights of the petitioner under the California statute it is said (p. 471):

> "**Being a fund raised in that way, it was entirely at the disposal of the Government, until, by the happening of one of the events stated—the resignation, dismissal, or death of the officer—the right to the specific sum promised became vested in the officer or his representative.** It requires no argument or citation of authorities to show, that in making a disposition of a fund

of that character, previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. **Until the particular event should happen upon which the money, or a part of it, was to be paid there was no vested right in the officer to such payment. His interest in the fund was, until then a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority.** The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization; the money which was to pay the amount claimed had been previously transferred and mingled with another fund, and was no longer subject to the provisions of that Act. Such being the nature of the intestate's interest in the fund provided by the law of 1878, there was no right of property in him of which he or his representative has been deprived.

If the two dollars a month, retained out of the alleged compensation of the police officer, had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that, upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised, with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express an opinion. It is sufficient that the two dollars retained from the police officer each month, though

called in the law a part of his compensation, were in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, **until used for the purposes designed,** could be transferred to other parties and applied to different purposes by the Legislature."

The opinion of the state court in the case at bar is silent as to relator's rights under the Police Pension Fund Act of the State of Illinois. That such court, however, recognizes that police officers exist and are entitled to the benefits of this act has been expressly decided by said court in the case of *Morgan* v. *People*, 216 Ill., 437, wherein it has said (p. 444):

> "The facts relating to the claims of the appellees other than Margaret Morgan are not set out or mentioned in the abstract or briefs, and in our consideration of the case we will confine ourselves to the facts as disclosed and relating to the case of the appellee, Mrs. Morgan. James Morgan, her husband, was a police officer of Chicago more than twenty years and was upwards of fifty years of age on November 30, 1891, and was retired as of that date from active duty on a pension of $50.50 a month, under the Act of 1887."
>
> * * * * * * *
>
> "We may say the act went further, and preserved the rights not only of the officers in active service, but all the officers drawing pensions under retirement by virtue of the Act of 1887."

In conclusion, we insist that a state, under our form of government and in sympathy with the fundamental rights guaranteed by our Constitution,

cannot arbitrarily deprive one of its citizens of his rights without notice and a hearing. We insist that this applies as well to one who has acquired rights by an administrative proceeding, conducted according to law and by favor of statutory enactment, as to any other means by which a legal right is acquired. It must be a clear case, resting upon positive law, that will permit any citizen to be deprived of any fundamental right, without notice and a hearing in his defense. In this case there are positive enactments in relator's favor granting him the safeguards claimed as his by lawful right. No construction of the Civil Service Act would deal equal justice to all included within its provisions that tended to discriminate against relator.

We have endeavored to show to this court that the laws of Illinois have never sanctioned the action taken in this case, and rest with confidence in the words of Chief Justice Marshall heretofore quoted, that, in this Republic, courts can never dispense with notice and a hearing, "unless under the mandate of positive law."

Respectfully submitted.

ALLEN B. CHILCOAT,
STEPHEN A. DAY,
Attorneys for Plaintiff in Error.

STEPHEN A. DAY,
Of Counsel.

FILED.

JUN 6 1911

JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

October Term, A. D. 1911.

No. [redacted] 474

THE PEOPLE OF THE STATE OF ILLINOIS,
[redacted] [redacted],
Plaintiff in Error,
vs.
CITY OF CHICAGO [redacted],
Defendant in Error.

In Error to the [redacted] Court of Cook County,
[redacted] October [redacted] A. D. 1911.

BRIEF OF [redacted] FOR PLAINTIFF IN ERROR, IN OPPOSITION TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

A. E. Chandler,
Stephen A. Day,
Solicitors for Plaintiff in Error.

Stephen A. Day,
Of Counsel.

SUBJECT INDEX.

Cases Cited.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 871.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. CHARLES H. GERSCH,
Plaintiff in Error,

vs.

CITY OF CHICAGO ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

Filed, November 29, A. D. 1911.

To John W. Beckwith,
Attorney for Defendants in Error:

Please take notice, that on Monday, June 3, 1912, at the opening of said court, or as soon thereafter as counsel can be heard, we shall present to said court, brief of argument of plaintiff in error in opposition to motion of defendants in error to dismiss writ of error or affirm judgment of the Supreme Court of Illinois, copy of which is hereto attached.

E. B. Chilcoat
Stephen A. Day
Attorneys for Plaintiff in Error.

Received copy of the above notice this 4th day of June, A. D. 1912.

John W. Beckwith
Attorney for Defendants in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 871.

THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. CHARLES H. GERSCH,

Plaintiff in Error,

vs.

THE CITY OF CHICAGO, ET AL.,

Defendants in Error.

IN ERROR TO SUPREME COURT OF ILLINOIS, FILED NOVEMBER 29, A. D. 1911.

BRIEF OF ARGUMENT, PLAINTIFF IN ERROR, IN OPPOSITION TO MOTION OF DEFENDANTS IN ERROR, TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT OF SUPREME COURT OF ILLINOIS.

Now comes the plaintiff in error, in the above entitled cause, by counsel, and presents to the court his brief of argument in opposition to the motion of defendants in error to dismiss the writ of error or affirm the judgment of the Supreme Court of Illinois.

Defendants in error set up in their motion to dismiss said writ,

First: "That there is no such federal issue in-

volved in said cause as to give this court jurisdiction; and

Second: "That the contentions of plaintiff in error, seeking to raise a federal issue in this cause are so frivolous as not to need further argument."

In our reply, in opposition thereto, we affirm and firmly believe,

First: That there are such Federal questions involved in this cause as to give this court jurisdiction; and

Second: That the contentions of plaintiff in error, in seeking to raise the said Federal questions, are meritorious; and that they, as we firmly believe, can be fully established, if counsel for plaintiff in error be permitted to fully present argument in favor thereof, to this Court.

In making our statement of the said cause of action, we desire to present to this Court all the salient and material facts in issue, as set forth in the pleadings, as briefly and concisely as we may, all of which are admitted by the general demurrer, filed thereto by the defendants in the trial court, defendants in error herein.

ABSTRACT OF RECORD.

This is a writ of error to the Supreme Court of the State of Illinois, to review the judgment of that court, affirming the judgment of the Superior Court of Cook County, Illinois, denying a writ of *mandamus* to the relator in said cause. The judgment was rendered in the Superior Court of said Cook County, after a general demurrer to the petition had been sustained by said Superior Court.

On February 25, 1911, the petitioner, plaintiff in error herein, filed his petition in the Superior Court of Cook County, Illinois, praying for a writ of *mandamus*, to restore his name upon the roster of police patrolmen in the department of police in the City of Chicago, and upon the pay roll thereof, and to certify his name for the payment of his salary, from month to month, as such police patrolman. The demurrer of defendants in error was sustained by the court and petition dismissed.

Petitioner sued out a writ of error to said court to review the judgment, on the ground that he was illegally and without warrant of law wrongfully removed from the roll of said police patrolmen, in said department of police, *and was then and there illegally and without due process of law*, DEPRIVED OF HIS RIGHT *to perform the duties or functions of his office*, AND OF HIS LEGAL RIGHT TO SHARE in the Police Pension Fund, created under and by virtue of the Police Pension Fund Law of the State of Illinois, in force at the time of his said removal from

said roll. Petitioner's right to said pension was vested by the fact of his having served over thirty-four years on the police force in said city.

The salient and material facts averred in said petition, beginning at page 2 of the transcript of record herein, are as follows:

That on the 13th day of February, 1863, the People of the State of Illinois, represented in the General Assembly, duly passed an act to reduce the charter of the City of Chicago, and the several acts amendatory thereof into one act, and revise the same.

By Section 1 of Chapter X of said act, there was established an executive department of the municipal government of said city, to be known as the board of police, said board to consist of three commissioners, in addition to the mayor, who should be *ex officio* a member thereof.

By Section 4 of said act the said board was to assume and exercise the entire control of the police force of said city, and to possess full power, and authority over the police organization, government, appointments and discipline within said city.

By Section 6 of said act, the duties of the police force were to be exercised under the direction and control of said board, and according to rules, it was thereby authorized to pass from time to time. That said police force should consist of a superintendent of police, three captains of police, six sergeants, ninety police patrolmen, and as many more police patrolmen as should be authorized by the common council on application by said board, *that the said offices thereby created, should be severally filled by*

appointment in the mode prescribed by the act. That each person so appointed should hold office only during such time as he should faithfully observe and execute all the rules and regulations of said board, the laws of the state, and the ordinances of the city.

By Section 7, of said act, it was provided, that no person should be removed therefrom (the police force), except upon written charges preferred against him to the board of police, and an opportunity should be afforded him of being heard in his defense.

That the said police force of said City of Chicago, continued under the control of said Board of Police, until after the adoption, by said City of Chicago, of the said General Act to provide for the Incorporation of Cities and Villages, April 23, 1875.

That by Section 6 of said Act, it was declared that all courts in the state should take judicial notice of the existence of all villages and cities organized under said act, and the changes of the organization of said act; and from the time of such organization or changes of organization, the provisions of said act should be applicable to such cities and villages, and that all laws in conflict therewith should no longer be applicable. But that all laws or parts of law, not inconsistent with the provisions of said act, should continue in force and applicable to any such city or village, the same as if such change of organization had not taken place. That by Section 1 of Article V of said act it was amongst other things provided that the city council in cities, and the presi-

dent and board of trustees in villages, should have the following powers:

> "Sixty-six. To *regulate* the police of the city or village and to pass and enforce all necessary ordinances. * * *
>
> Sixty-eight. To *prescribe* the duties and powers of a superintendent of police, policemen and watchmen."

That on the 17th day of August, 1876, petitioner was duly appointed to the office of police patrolman in the department of police in said City of Chicago, by the then General Superintendent of Police of said city, which appointment he then and there accepted, and took and subscribed the oath of office.

That after taking such oath of office, he entered upon the performance of his duties as such police patrolman, and continued thereafter in the discharge thereof until his further performance of such duties was wrongfully and illegally interrupted, as set forth in said petition.

That the office of police patrolman, to which said petitioner (plaintiff in error herein) was appointed as aforesaid, was an office created by the said act of the Legislature of the State of Illinois, February 13, 1863, and first above referred to, and by the amendment thereto passed by said Legislature, February 16, 1865, and secondly above referred to; which said two acts, so far as the provisions thereof created the office of police patrolman in and for said City of Chicago, continued in full force and effect, as valid and existing laws of said state, at the time of petitioner's appointment to said office as aforesaid; and that, in so far as said acts of said Legislature

created the office of police patrolman, they were never repealed, but are still in force and effect.

That at a general election held in the City of Chicago, on the 2nd day of April, 1895, said city adopted an act passed by the Legislature of the State of Illinois, entitled "An Act to regulate the Civil Services of Cities, approved and in force March 20, 1895." Said act was declared in force in the City of Chicago by the mayor of Chicago.

That by Section 3 of said Act it is expressly required that said commissioners shall classify all the offices and places of employment in said city, except those offices and places mentioned in Section 11 of said act. The offices and places so classified by the commission shall constitute the classified service of such city. That by Section 4 of said act said commission should make rules to carry out the purpose of the act, and for examinations, appointments and removals in accordance with its provisions. That by Rule I of the rules adopted by said commissioners, it was among other things provided that "*Class A should be known as the official service.*" That for convenience in certifying for appointments and promotions, and in making removals, the official service shall be divided into divisions. It was provided—"Division D.—Police Division—All persons in the uniformed police force."

That all policemen in said City of Chicago, including petitioner, plaintiff in error herein, were, at the time of said classification, in the uniformed police force of said city, and by virtue of said act and rule of said commission, and classification thereunder, became and were classified in said Division D of the

said official service of said city, under said Civil Service Act; and thereupon the offices and places so classified by said commission, did "constitute the classified service of said city."

That by said classification all persons in the said classified service, including petitioner, plaintiff in error herein, then and there became police patrolmen *de jure,* in said classified service, and entitled to their salary or pay as such, on said police force.

That on the 31st day of July, 1909, LeRoy T. Steward was duly appointed to the office of superintendent of police of the City of Chicago; and having qualified as such superintendent of police of said city, entered upon the discharge of the duties of such office; that on, to-wit, the 2nd day of December, 1910, the said LeRoy T. Steward, as superintendent of police of said city, *wrongfully, illegally and without warrant of law, directed that the name of petitioner, plaintiff in error herein, be dropped from the pay roll of police patrolman of said city;* that thereupon by and under such direction the name of petitioner, plaintiff in error herein, was dropped from said pay roll without notice of any written charges having been preferred against him by the proper officer; and without any trial of any charges of any nature preferred against him before a proper trial board; nor was any such action because of any alleged misconduct on his part.

That said action by said superintendent of police of said city was a wrongful denying to petitioner as aforesaid of his legal rights, as said police patrolman of said city, *duly enrolled and certified,* and

was without due process of law. That no part of the salary so accruing to and due him, as aforesaid, from said 2nd day of December, 1910, until the present time, has ever been paid to him, although he has made demand therefor; that under the provisions of the law of the State of Illinois and the ordinances of the City of Chicago, the salary to which petitioner was lawfully entitled from the said 2nd day of December, 1910, until the present time was, and is, the sum of $100 per month.

From the 17th day of August, 1876, up to and including the 2nd day of December, 1910, there was from time to time paid into the Police Pension Fund, under the provisions of the then existing Police Pension Laws of the State of Illinois, *the sum of one per cent. from each and every monthly payment of salary accruing to him; and that under the provisions of said pension law, to which for greater certainty, and the fuller statement of the* LEGAL RIGHT *thereby secured to him to share in said fund, he prays to refer with the same effect as if said act, being then and still one of the public laws of the State of Illinois, were herein fully set forth and quoted.*

That said act of the said superintendent of police of said City of Chicago, in directing the name of petitioner to be dropped from the pay roll of policemen of said city, resulted in the denying to him his LEGAL RIGHT to share in the benefit of said fund, and was and is wholly unauthorized, and without due process of law. And was and is contrary to Section 2 of Article 2 of the Constitution of the State of Illinois, and Section 1 of Article XIV of the Constitution of the United States.

That said action of the said superintendent of police in omitting and excluding the name of petitioner from the pay roll of police patrolmen of said city had and has the effect to deprive petitioner of his RIGHT *to exercise the functions and duties of a police patrolman, as a member of the classified Civil Service of said city,* and to receive and enjoy the salary pertaining to his said office, and deprived him of his vested right to share in and enjoy the Police Pension Fund, and was and is a wrongful denying to him of his LEGAL RIGHTS without due process of law, *and the equal protection of the law.*

For the convenience of the Court, we quote from the Statutes of the State of Illinois, pertinent sections of the Police Pension Fund Law, approved April 29, 1887, in force July 1, 1887. (Rev. Stat. Ill. (1905), pp. 378, 379 and 380.)

We will specially call attention to Sections 1, 3, 4 and 5 of said act.

> "Section 1. That in each city, village and incorporated towns in this state, having a population of 50,000 inhabitants or more, there shall be set apart the following moneys to constitute a police pension fund. * * *
>
> "*Third.* All moneys paid for special details of *Police Officers.*"
>
> "*Eleventh.* One per cent. per month, which shall *be paid or deducted from the salary of each and every member of the police department of such city, village or town: Provided, no such member shall be compelled to pay more than* $1.00 *per month from his salary.*"
>
> "Section 3. *Whenever any person at the time of the taking effect of said act, to which this is an amendment, or thereafter shall be duly appointed and sworn, and have served for the pe-*

riod of twenty years or more upon the regularly constituted police force of such city, village or town of this state, subject to the provisions of this act, or where the combined years of service of any person upon the police force and the fire department, as aforesaid, of such city, village or town of this state, shall aggregate twenty years or more, said board shall order and direct that such person, after becoming fifty years of age and his services on such police force shall have ceased, and all officers entitled to and having a pension under said act, to which this is an amendment, after the taking effect of this act, shall be paid from such fund, a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement; provided, however, the maximum of said pension shall not exceed the sum of $900 and the minimum not less than $600. And after the decease of such member his widow or minor child or children under sixteen years of age, if any survive him, shall be entitled to the pension, provided for in this act, of such a deceased husband or father; but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of said police department after she shall have remarried. *And provided further, that all police officers retired after twenty years' service in the police department of such city, village or town, and who are above the age of fifty years now on the police pension rolls shall receive the same pension now allowed them. Provided, that in no case shall said pension exceed the sum of* $900."

"Section 4. *Whenever any person, while serving as a policeman, in any such city, village or town, shall become physically disabled while in and in consequence of the performance of his duties as such policeman, said board shall upon*

his written request, or without such request, if it deem it for the good of said police force, retire such person from active service, and order and direct that he be paid from said fund a yearly pension not exceeding one-half the amount of the salary attached to the rank which he may have held on said police force at the time of his retirement; Provided, that the maximum sum of such pension shall not exceed the sum of $900 per year; and the minimum not less than $600; *Provided, further, that whenever such disability shall cease such pension shall cease.*" (As amended by act approved and in force May 16, 1903.)

"Section 5. *No person shall be retired as provided in the next preceding section, or receive any benefits from said fund unless there shall be filed with said board certificates of his disabilities, which certificates shall be subscribed and sworn to by said person and by the police surgeon (if there be one) and two practicing physicians of such city, village or town, and such board may require other evidence of disability before ordering such retirement and the payment aforesaid.*"

STATEMENT.

The motion of defendants in error is based upon the grounds, first, that there is no Federal question in the case, and, second, that the contentions of plaintiff in error seeking to raise a Federal question in this case are so frivolous as not to need further argument.

There is no possible doubt but that there was a Federal right specially set up and denied by the State Court. In its opinion it has said:

> "On February 15, 1911, the plaintiff in error filed a petition in the Superior Court of Cook County praying for a writ of *mandamus* to place his name upon the roster of police patrolmen of the City of Chicago and upon the pay roll and to *certify his name* for payment of his salary as such police patrolman. A demurrer was sustained to the petition, and the petitioner having elected to stand by it, the petition was dismissed at his costs. The petitioner has sued out a writ of error from this court to review the judgment on the ground that by it his right to share in the police pension fund is abridged, in violation of the Fourteenth Amendment to the Constitution of the United States and of Section 2 of Article 2 of the Constitution of this State."

It thus appears that the Constitution of the United States was invoked to protect the right of the petitioner arising therefrom. This, we submit, disposes of the contention that there is no Federal question in the case.

The petition for a writ of mandamus relied, first, upon petitioner's rights as a police officer of the City

of Chicago and a duly certified and enrolled officer in full standing under the Civil Service Act of the State of Illinois; and, second, upon his rights under the Police Pension Fund Act of the State of Illinois under which he had paid a percentage of his salary monthly for thirty-four years and which law had been in no way repealed but was and is in full force and effect. The opinion of the Supreme Court of Illinois disposes of both these contentions in the language just above quoted. It thus appears that one of the Federal questions in the case was distinctly and expressly passed upon in the opinion of the State Court and was given specific mention.

BRIEF OF ARGUMENT.

It is well settled under the decisions of this Court that a motion to dismiss will be denied where a claim of Federal right under the Constitution of the United States has been specially set up and denied by the decision of the State Court, whether such question appears to have been expressly passed upon or must have been denied by the State Court in reaching its conclusion.

Missouri K. & T. R. Co. v. *Elliott*, 184 U. S., 30.

Kaukauna Co. v. *Green Bay & Canal Co.*, 142 U. S., 254.

Detroit, etc., Ry. v. *Osborn*, 189 U. S., 383.

Schlemmer v. *Buffalo, Rochester, etc., Ry.*, 205 U. S., 1, 11.

Terre Haute & Indianapolis R. R. Co. v. *Indiana*, 194 U. S., 579.

Louisville Gas Co. v. *Citizens Gas Co.*, 115 U. S., 683, 697.

Chicago Life Ins. Co. v. *Needles*, 113 U. S., 574, 579.

Bohanan v. *Nebraska*, 118 U. S., 231.

West Chicago R. R. v. *Chicago*, 201 U. S., 506, 519, 520.

This doctrine is so fully recognized that we will only quote from the last case just above cited (*West Chicago Railroad* v. *Chicago, supra*):

> "The contention of the city that the writ of error shall be dismissed for want of jurisdic-

> tion in this court cannot be sustained. It is true that the judgment of the State Court rests partly upon the grounds of local or general law. But, by its necessary operation—although the opinion of the State Court does not expressly refer to the Constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot in any view of the case, be granted consistently, either with the contract clause of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. **If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for, the Federal questions arose covering the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this Court had jurisdiction to inquire whether those claims are sustained by that instrument.** Our views on this question are fully stated in *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Commissioners*, 200 U. S., 561."

In *Detroit, etc., Ry.* v. *Osborn, supra*, which was a petition for a writ of mandamus setting forth a claim of a denial of due process of law under the Constitution of the United States, similar to the petition in the case at bar, it was said:

> "A motion is made to dismiss the writ of error on the ground that the record exhibits no Federal question. The motion is denied. The plaintiff claimed and set up a right under the Constitution of the United States and the decision of the Supreme Court of the State was tantamount to the denial of that right. *Kaukauna Co.* v. *Green Bay & Canal Co.*, 142 U. S., 254."

As to the second ground of the motion that the Federal question in this case is so frivolous as not to need further argument, we deem it necessary for the purposes of this motion only to refer to the fact that petitioner was duly certified and enrolled under the Civil Service Act of the State of Illinois as one of the uniformed police of the City of Chicago and as such was paid by said city. It is contended that such certification did not operate to confer upon petitioner the office of police patrolman and that it has no bearing upon the question as to whether petitioner was a *de jure* officer. **But petitioner need not have been a technical officer—he could not be deprived of his rights acquired by the certification and enrollment without due process of law.**

United States ex rel. Turner v. Fisher (Dec. 4, 1911), 222 U. S., 204.

Garfield v. *United States*, 211 U. S., 249.

To reach this conclusion the Supreme Court of Illinois saw fit to take a position contrary to that of this Court in the case of *United States* v. *Wickersham*, 201 U. S., 390, and we quote the following language from the opinion (p. 397) therein:

> "On September 26, 1896, under the extension order referred to and the action of the Secretary of the Interior, the acting Secretary of the Interior filed a list of positions and employees with the Civil Service Commission, which, among others, in the list of employees in the offices of surveyors-general, contained the name of the appellee as a stenographer and typewriter, the date of his appointment, salary and residence, as stated in the findings of fact. By the action recited on the part of the President and the head

of the Department of the Interior, Wickersham was brought within the protection of the law and the President's order afforded to persons duly entered in the classified Civil Service. **While he may not technically have been an officer of the United States with a fixed term and compensation, he certainly was within the subordinate places provided for in the statute, and within the 'employes outside the District of Columbia,' covered by the President's order of May 6, 1896. That order expressly included officers and employes, whether compensated by a fixed salary or otherwise, serving in a clerical capacity or whose duties were in whole or in part of a clerical nature. The Secretary of the Interior certified the name of the claimant to the Civil Service Commission as an employe in the office of the surveyor-general, within the terms of the statutes and the Executive order. He was therefore entitled to the protection of the President's order of July 27, 1897 (14 Ann. Rep. Civ. Serv. Comm. 133); 'no removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.'**

If the contention of the Government be correct and the attempted suspension by the surveyor-general was equivalent to a dismissal from office, such action would run counter to the requirements of the Presidential order just quoted. The action of the surveyor-general was not upon written charges, and no notice or opportunity to make defense was given to the accused, as provided in that order. The appellee being entitled to the protection of this order, and to have notice of the charges preferred, and an opportunity to make defense, the attempted removal, if such it was, was without legal effect nor can

> we find any authority, statutory, or otherwise, authorizing the suspension in the manner undertaken in this case."

The first Federal question presented is whether the decision of the State Court permitting petitioner to be deprived of his *rights* as a policeman in good standing and with ability to perform the duties of his office, *duly enrolled according to law and certified under the Civil Service Act of the State of Illinois*, without a hearing and without charges preferred against him, is not a denial of due process of law, the equal protection of the laws and the abridgment of his privileges and immunities as a citizen of the United States. In other words, does not the Fourteenth Amendment of the Constitution of the United States guarantee to petitioner the right to have notice of the charges preferred against him and to be heard in his defense, before striking his name from the rolls—rights which were specially set up and prayed for in the petition? Is not an adjudication which, in the absence of Constitutional or Statutory warrant of law, will permit a policeman to be thus deprived of his rights, wanting in due process of law, does it not deny to him the equal protection of the laws, and abridge his privileges and immunities as a citizen of the United States and of the State of Illinois?

As this Court said in *Garfield* v. *United States*, 211 U. S., 249:

> "It has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

> The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this Court."

In *Dent* v. *West Virginia*, 129 U. S., 124, this Court said:

> "The great purpose of the requirement of due process of law is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."

In *Hovey* v. *Elliott*, 167 U. S., 414, this Court, speaking through the present Chief Justice, said:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

In *McVeigh* v. *United States*, 11 Wall., 259, this Court said:

> "The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. * * * The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

In *Windsor* v. *McVeigh*, 93 U. S., 277, this Court used the following language:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has any thing to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard and when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard."

The action of the State Court in denying the petitioner his Federal rights is sought to be supported in the brief of defendants in error, upon the theory that no property right is involved and the case of *Donahue* v. *Will County*, 100 Illinois, 94, is cited. In answer to this contention, it is only necessary to refer to the fact that Section 2 of Ar-

ticle 2 of the Constitution of the State of Illinois was before the Court in that case, and no question or construction of the Fourteenth Amendment of the Constitution of the United States. Whatever may have been said by the Supreme Court of Illinois in regard to what constitutes property within the meaning of the Illinois Constitution is not decisive of that question in this Court, for reasons which are obvious and entirely well understood.

The opinion of the State Court dismisses plaintiff in error's petition, with the observation that the Legislature not the Court must afford him due process of law. It has disregarded the provision of the Fourteenth Amendment of the Constitution of the United States which has secured to petitioner the right to notice and a hearing in his defense before his rights are taken away.

In a consideration of civil rights under the Fourteenth Amendment, no definite rule has ever been announced, but Mr. Justice Miller's process of "inclusion and exclusion" has been applied. Whether under the petition now before the Court there has been any deprivation of Federal rights cannot be determined without a full consideration of all the facts and surrounding circumstances. It is, therefore, idle to attempt to urge this Court to deny a full hearing to plaintiff in error merely because of what the State Court decided was the proper interpretation of its own Constitution.

As to the second Federal question presented, that covering the claim under the Police Pension Fund Act, we desire to emphasize the fact that the statute

in express terms mentions "police officers" and "policemen," and that its provisions are in favor of such officers. The petition sets up that the plaintiff in error is such a police officer and policeman, as is mentioned by the statute, the allegation is well pleaded, and, therefore, admitted by the demurrer interposed on behalf of defendants in error.

We have been successful in discovering that the exact question now before the Court was decided by this Court in the case of *Pennie* v. *Reis*, 132 U. S., 464, wherein was presented a consideration of the California Police Pension Act. The California statute in that case differs from the statute pleaded in this case inasmuch as the salary of the policeman in the California Act was fixed by the State as well as the amount to be retained each month for the pension fund, whereas under the Illinois statute, *the policeman is required to pay out of his salary*, one per cent. per month and in no case over three dollars per month, and nothing is said as to the amount of his salary. **In Illinois the salary is fixed by the city.**

Petitioner had served over twenty years on the police force of Chicago and his right to a pension was vested, by the terms of the Act.

Furthermore, there has been no repeal in any way of the provisions of the Illinois Pension Act and the question as to the effect of a repealing statute upon rights not vested is not in this case. At the outset of the opinion delivered by Mr. Justice Field (p. 469) it is said:

> "It was contended in the court below that this later Act of March 4, 1889, violated that provision of the Constitution of the United States,

and of the State, which declares that no person shall be deprived of his property without due process of law."

And in speaking of the rights of the petitioner under the California statute it is said (p. 471):

"**Being a fund raised in that way, it was entirely at the disposal of the Government, until, by the happening of one of the events stated—the resignation, dismissal, or death of the officer—the right to the specific sum promised became vested in the officer or his representative.** It requires no argument or citation of authorities to show, that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. **Until the particular event should happen upon which the money, or a part of it, was to be paid there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority.** The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization; the money which was to pay the amount claimed had been previously transferred and mingled with another fund, and was no longer subject to the provisions of that Act. Such being the nature of the intestate's interest in the fund provided by the law of 1878, there was no right of property in him of which he or his representative has been deprived.

If the two dollars a month, retained out of

the alleged compensation of the police officer, had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that, upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised, with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express an opinion. It is sufficient that the two dollars retained from the police officer each month, though called in the law a part of his compensation, were in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes designed, could be transferred to other parties and applied to different purposes by the Legislature."

The opinion of the State court in the case at bar is silent as to petitioner's rights under the Police Pension Fund Act of the State of Illinois. That such court, however, recognizes that police officers exist and are entitled to the benefits of this act has been expressly decided by said court in the case of *Morgan* v. *People*, 216 Ill., 437, wherein it has said (p. 444):

"The facts relating to the claims of the appellees other than Margaret Morgan are not set out or mentioned in the abstract or briefs, and in our consideration of the case we will confine ourselves to the facts as disclosed and relating to the case of the appellee, Mrs. Morgan. James Morgan, her husband, was a police officer of Chicago more than twenty years and was upwards of fifty years of age on November 30, 1891, and was retired as of that date from

active duty on a pension of $50.50 a month, under the Act of 1887."

And, further, on page 445, it is said:

"We may say the act went further, and preserved the rights not only of the officers in active service, but all the officers drawing pensions under retirement by virtue of the Act of 1887."

It is said in the opinion (p. 449):

"A pension is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power."

Defendants in error, in their brief, refer to this language as sufficient to show that there is no Federal right denied to petitioner by the decision of the State Court. But the absurdity of such a contention is at once apparent when we consider that the petitioner was not deprived of his rights under this act, whatever they were, in accordance with due process of law. Furthermore, the right of petitioner to share in the pension fund, had become vested in him, by the length of his service, and the money paid by him under the terms of said Act. Whether the proceedings taken by the defendants in error amounted to due process of law must be determined by this Court for itself, since the jurisdiction of this Court has been properly invoked by the petitioner. Such an arbitrary and apparently illegal action must find its justification in the written law of the State, in the Constitution or statutes. But in Illinois the very statute itself excludes any warrant of law for such high-handed and unjust action. *The superintendent of police had clearly no power or authority*

whatsoever to deprive petitioner of his vested right to a pension under the Police Pension Fund Act. Upon this point we desire only to refer to a single case, *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S., 683, 696. The following is quoted from the opinion by Mr. Justice Harlan:

> "The language of this statute is too plain to need interpretation. * * * As this question is at the very foundation of the inquiry whether the defendant had a faulty contract with the state, the obligation of which has been impaired by subsequent legislation, we cannot avoid its determination. Whether an alleged contract arises from state legislation, or by agreement with the agents of a state, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment and independently of the adjudication of the State Court, to decide whether there exists a contract within the protection of the Court of the United States. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Wright* v. *Nagle*, 101 U. S., 791, 794; *Louisville & Nashville R. R.* v. *Palmes*, 109 U. S., 254, 257. After carefully considering the grounds upon which the State Court rests its conclusion, we have felt constrained to reach a different result."

Also to the following, taken from the opinion of this Court in *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, 579:

> "The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the Court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of the state

proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This Court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a Federal nature must, therefore, be denied."

The case of *Schlemmer* v. *Buffalo, Rochester, etc., Ry.*, 205 U. S., 1, is also very instructive upon this point, and we desire to quote the following from the opinion by Mr. Justice Holmes (p. 11):

"We certainly do not mean to qualify or limit the rule that, for this Court to entertain jurisdiction of a writ of error to a State Court, it must appear affirmatively that the State Court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. *Bachtel* v. *Wilson*, Jan. 7, 1907, 204 U. S., 36. But, on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact, involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it. *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 142 U. S., 254. And if it is evident that the ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579."

And to the following quoted from page 587 of the opinion by the same eminent justice in the case last cited:

> "We are driven to a different construction of the charter, notwithstanding the deference naturally felt for the decision of a State Court upon state laws. The language is plain."

And on page 589 thereof the following:

> "We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the State Court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this Court. *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S., 683, 697."

We insist that the provisions of the pension law are plain and clear and that petitioner was a police officer, and policeman, within the meaning of that act, and cannot be deprived of his Federal rights thereunder by any decision of the State Court that he is not such officer. We insist that this is a cognizable mistake and cannot and should not be followed by this Court. Upon that question the opinion of the Supreme Court of Illinois is silent and it has seen fit to dismiss the petition without specifically passing upon it, otherwise than as included within the general deduction that there is no ordinance in Chicago constituting petitioner a police officer. If he is not a policeman within the meaning of the Pension Act, who are meant by these words in that Act? If ever language was plain, clear and unmistakable, then the reference to police officers and policemen under

the Pension Act includes petitioner. **The State Legislature, by statute, conferred the rights upon petitioner, and no ordinance of the city was necessary.** Furthermore, for thirty-four years he has paid each month, from his salary, a certain percentage into that fund under the expectation that he would be entitled eventually to the provisions for his benefit in said Act; and that the city would proceed under the provisions and by the method provided in the Act, if his dismissal were sought. *Petitioner, by the terms of the Act, had a vested right to his pension.* He had served fourteen years more than the required time as a policeman and had paid into the pension fund one dollar per month for thirty-four years. As we have mentioned before, this Act has not been repealed but is in full force and effect within the State of Illinois. To attempt to overcome the effect of plain language which distinctly mentions and includes within its phraseology police officers and policemen, by saying that there is no such thing as a police officer in Illinois, is so arbitrary and unfounded as to entitle it to be disregarded by this Court. In addition to the designation of police officers, in that Act, there are provisions for the benefit of *policemen.* Certainly such a conclusion by the Supreme Court of Illinois will not conclude this Court in passing upon the Federal questions in the record clearly set up and as clearly denied by the Supreme Court of Illinois, not in express terms but none the less deadly because of its silence upon that point.

In conclusion, we respectfully request that plaintiff in error be given a full and fair opportunity to

present the merits of his petition before this Court. The Federal questions presented have been properly raised and are meritorious, and the argument will demonstrate the absolute soundness of the contentions made by the plaintiff in error. There are no independent questions of general law in this case. The decision of the State Court in denying the Federal rights set up is founded upon a misconception and a narrow view of the guaranties of the Federal Constitution. The Federal questions, clearly presented, prevent the writ of error from being dismissed, and we desire to be heard before the judgment of the State Court is affirmed.

Respectfully submitted,

A. B. CHILCOAT,
STEPHEN A. DAY,
Attorneys for Plaintiff in Error.

STEPHEN A. DAY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1911.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. CHARLES H. GERSCH,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO, FRED A. BUSSE, as Mayor of said City, LEROY T. STEWARD, as Superintendent of Police of said City, et al.,
Defendants in Error.

No. 474.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.
FILED NOVEMBER 29, 1911.

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT OF THE SUPREME COURT OF ILLINOIS.

NOTICE, MOTION, STATEMENT, BRIEF AND ARGUMENT.

JOHN W. BECKWITH,
ASSISTANT CORPORATION COUNSEL,
ATTORNEY FOR DEFENDANTS IN ERROR.

WILLIAM H. SEXTON,
CORPORATION COUNSEL,
OF COUNSEL.

BARNARD & MILLER PRINT., CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. CHARLES H. GERSCH,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO, FRED A. BUSSE,
as Mayor of said City, LEROY T. STEWARD,
as Superintendent of Police of said City, et al.,
Defendants in Error.
} No. 871.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS. FILED NOVEMBER 29, 1911.

To A. B. CHILCOAT, ESQ.,
Attorney for Plaintiff in Error.

PLEASE TAKE NOTICE that on Monday, June 3, 1912, at the opening of said court, or as soon thereafter as counsel can be heard, the motion, a copy of which is hereto attached, will be submitted to said court for its decision thereon. Annexed hereto is a copy of the statement of the matter involved and brief and argument which will be submitted with said motion in support thereof.

.....

Assistant Corporation Counsel.
Attorney for Defendants in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. CHARLES H. GERSCH,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO, FRED A. BUSSE, as Mayor of said City, LEROY T. STEWARD, as Superintendent of Police of said City, et al.,
Defendants in Error.
No. 871.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS. FILED NOVEMBER 29, 1911.

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT OF THE SUPREME COURT OF ILLINOIS.

Now come the defendants in error in the above entitled cause by their attorney and move the court to dismiss said writ of error under rule 4 of the rules of this court promulgated December 22, 1911, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Illinois in accordance with the provisions of rule 5 of the rules promulgated December 22, 1911, on the ground,

First. That there is no federal issue involved in said cause so as to give this court jurisdiction; and

Second. That the contentions of plaintiff in error seeking to raise a federal issue in this cause are so frivolous as not to need further argument.

STATEMENT.

On February 15, 1911, the plaintiff in error filed a petition in the Superior Court of Cook County praying for a writ of mandamus to place his name upon the roster of police patrolmen of the City of Chicago and upon the pay-roll and to certify his name for payment of his salary as such police patrolman. A demurrer was sustained to the petition, and the petitioner having elected to stand by it, the petition was dismissed at his costs. Judgment affirmed by State Supreme Court. The petitioner has sued out a writ of error from this court to review the judgment on the ground that by it his right to share in the police pension fund is abridged, in violation of the fourteenth amendment to the constitution of the United States and of Section 2 of Article 2 of the constitution of this state.

The petition sets out very fully the provisions of the charter of the City of Chicago of 1863 in regard to the police department, the amendment thereof and a number of ordinances of the city upon the subject of the police; the adoption by the city of the Cities and Villages Act on April 23, 1875; the passage on June 28, 1875, of an ordinance for the reorganization of the police department, and on April 13, 1881, of another ordinance on that subject; the adoption on March 25, 1895, of the City Civil Service Act by the voters of the city and its going into effect on July 1, 1895. All these facts are alleged as they appeared in the case of *Bullis* v. *City of Chicago*, 235 Ill. 472. The petition also alleges the

appointment of a board of civil service commissioners and their adoption of rules and classification of the offices and places of employment in the city. It is then alleged that Charles H. Gersch, the plaintiff in error, was appointed to the office of police patrolman on August 17, 1876, by the general superintendent of police, took the oath of office, entered upon the performance of his duties and continued therein until wrongfully discharged; that he continued in office and was recognized as police patrolman by the mayors, superintendents of police and city councils and no successor was appointed for him, but money was appropriated for his salary, and his salary as such police patrolman was paid to him until July 1, 1893, when he was promoted to police patrol sergeant, the duties of which office he performed until June 1, 1895, when he was promoted to police desk sergeant, which office he held when the Civil Service Act went into effect, July 1, 1895; that thereupon he became a member of the classified civil service of the City of Chicago and so continued as police desk sergeant until November 23, 1907, when he was wrongfully reduced to the office of police patrolman, in which he served until December 2, 1910, when his name was dropped from the pay roll by order of the superintendent of police, wrongfully and without warrant of law, without any written charges, without trial and for no alleged misconduct. During all the time from July 1, 1895, to December 2, 1910, all pay rolls of officers and employes of the City of Chicago, including police patrolmen and sergeants in the police force, have been certified by the board of civil service commissioners, and the plaintiff in error has been so certified and paid.

POINTS AND AUTHORITIES.

I.

IF THE DECISION OF THE STATE COURT IS UPON GROUNDS BROAD ENOUGH TO SUPPORT THE JUDGMENT INDEPENDENT OF ANY FEDERAL QUESTION, THERE IS NO FEDERAL ISSUE INVOLVED IN THE CASE SO AS TO GIVE THIS COURT JURISDICTION AND IT WILL NOT ENTERTAIN A WRIT OF ERROR.

Rutland Railroad Co. v. Central Vermont R. Co., 159 U. S. 630.

Moran v. Horsky, 178 U. S. 205.

Pittsburgh, etc., Iron Co. v. Cleveland Iron Min. Co., 178 U. S. 270.

Marrow v. Brinkley, 129 U. S. 178.

Castillo v. McConnico, 168 U. S. 674.

Klinger v. Missouri, 13 Wall. (U. S.) 263.

Capital National Bank v. Cadiz First Nat. Bank, 172 U. S. 425.

Harrison v. Morton, 171 U. S. 38.

Pierce v. Somerset R. Co., 171 U. S. 641.

Wade v. Lawder, 165 U. S. 624.

Bacon v. Texas, 163 U. S. 207.

Seneca Nation v. Christy, 162 U. S. 283

Gillis v. Stinchfield, 159 U. S. 658.

II.

PLAINTIFF IN ERROR HAS NO PROPERTY RIGHTS IN THE EMOLUMENTS OF THE POSITION OR OFFICE OF POLICE PATROLMAN, AND, THEREFORE, HAS SUFFERED NO DEPRIVATION THEREOF IN VIOLATION OF THE FEDERAL CONSTITUTIONAL GUARANTIES.

People v. *Kipley*, 171 Ill. 44, 71.
Donahue v. *County of Will*, 100 Ill. 94.
State v. *Hawkins*, 44 Ohio St. 98.

III.

NOR IS PLAINTIFF IN ERROR DEPRIVED OF HIS PROPERTY WITHOUT DUE PROCESS THROUGH BEING RENDERED INELIGIBLE FOR A POLICE PENSION BY THE CITY'S ACTION, SINCE THERE IS NO PROPERTY RIGHT IN A PENSION, WHICH IS MERELY A LARGESS OR GRATUITY.

Morgan v. *People*, 216 Ill. 437, 449.
Walton v. *Cotton*, 19 How. 355.
Frisbie v. *U. S.*, 157 U. S. 160.
26 Am. & Eng. Ency. of Law (2d Ed.), 658.

ARGUMENT.

Plaintiff in error is one of a class of city employes generally known as "hold-overs", namely, those employes who were holding positions in the city's service at the time when the act of the legislature concerning civil service in cities became effective in the City of Chicago in 1895.

The rights of these "hold-overs" as to their protection under the civil service law in the matter of discharge have been frequently adjudicated upon by the State Supreme Court in the following cases:

Stott v. *City of Chicago*, 205 Ill. 281.
McNeill v. *City of Chicago*, 212 *id.* 481.
Kennedy v. *City of Chicago*, 220 *id.* 485.
Schultheis v. *City of Chicago*, 240 *id.* 167.
People v. *City of Chicago*, 242 *id.* 561.
People ex rel. Gersch v. *City et al.*, 250 *id.* 551.
Preston v. *City of Chicago*, 246 *id.* 26.

In the last named case (pending in this court) a motion identical in character to this has been submitted based upon somewhat similar grounds.

It has been the contention of plaintiff in error, as well as the petitioners in the cases above cited, that they were entitled to protection against summary discharge by the general superintendent of police, either (1) by the charter of the City of Chicago of 1863, or (2) by the Civil Service Act of the State of Illinois.

In the long line of cases above referred to the State Supreme Court has decided that there is not now in force any statute or ordinance creating the office of police patrolman and that a suit of this character cannot be maintained without an ordinance creating such office. The cases, including plaintiff's in error own case in the State Supreme Court, also hold that he is not entitled to the protection of the civil service law because he never became a city employe under and by virtue of the provisions of the Civil Service Act.

The proposition of whether or not the law of the State of Illinois or the ordinances of the City of Chicago have created the office or position of police patrolman is one of fact or fact and general law, non-federal in character, upon which the decision of the state court is final. Likewise, the question of whether or not plaintiff in error was a civil service employe and as such entitled to the protection of the civil service law of the state is one of general law, and finally concluded by the judgment of the state court.

The writ of mandamus, being one of grace and not of right, will issue only when the facts set up show a clear right in petitioner to the relief sought, and even when a clear right is shown, the granting of the writ is discretionary with the court.

People v. *Olsen*, 215 Ill. 620.

People v. *Board of Supervisors*, 185 *id.* 288.

The question of whether the trial court in refusing the writ over-stepped the judicial discretion imposed in it, was one solely for the determination of

the state court and presents no federal question upon which to base a writ of error.

Without burdening the attention of the court by extended citation from the authorities quoted in our brief, we ask the court to note the language used in *Rutland Railroad Co.* v. *Central Vermont R. Co.*, 159 U. S. 630, 640, where the court said:

> "It is well settled, by a long series of decisions of this court, that where the highest court of a state, in rendering judgment, decides a federal question, and also decides against the plaintiff in error upon an independent ground not involving a federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the federal question. *Murdock* v. *Memphis*, 20 Wall. 590; *Jenkins* v. *Loewenthal*, 110 U. S. 222; *Beaupre* v. *Noyes*, 138 U. S. 397; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293; *Hammond* v. *Johnston*, 142 U. S. 73; *Tyler* v. *Cass County*, 142 U. S. 299; *Delaware Co.* v. *Reybold*, 142 U. S. 636; *Eustis* v. *Bolles*, 150 U. S. 361; in the last two of which many other cases to the same effect are cited."

Many of the questions involved in this case, which were before the Supreme Court of the State, are questions of purely local and state law and of the construction of state statutes and city ordinances. They involve the question of whether or not there is such an office in the City of Chicago as police patrolman under any statutes or ordinances in existence. They also involve the question as to whether the provisions of the Civil Service Act of the state cover employes known as "hold-overs", viz: those who were in service when the Civil Service Act took effect.

There can be no deprivation of *property* by reason of any decision of the state court in this case, for the reason that no *property* rights are involved, and the law in Illinois has always been that the incumbent of an office has no property right to the emoluments or fees of that office.

People v. *Kipley*, 171 Ill. 44, 71.
Donahue v. *County of Will*, 100 Ill. 94.
State v. *Hawkins*, 44 Ohio St. 98.

Even though the decision of the Supreme Court of the state had deprived plaintiff in error of his right to hold an office, it would not be depriving him of any emoluments constituting a *property* right. But let it be borne in mind that the decision of the Supreme Court *merely holds that there is no such office in existence*, and not that petitioner would not be entitled to such office, were there any such.

The petition of plaintiff in error raises certain contentions as to his rights in and to the police pension fund, which rights, he claims, had been cut off by his amotion from office. Upon this point suffice it to say, that plaintiff in error has no *property* rights in and to a pension, though he were entitled to such pension, because a pension is a mere largess or gratuity, or act of bounty on the part of the government or body granting it.

Morgan v. *People*, 216 Ill. 437, 449.
Walton v. *Cotton*, 19 How. 355.
Frisbie v. *U. S.*, 157 U. S. 160.
26 Am. & Eng. Ency. of Law (2d Ed.) 658.

The decision of the State Court is upon grounds broad enough to support the judgment ren-

dered by it, independent of any federal question. These grounds concern principles of law and questions of fact. The issues herein are impressed with no federal character such as to give this court jurisdiction.

Even if the federal questions involved had been below and should be here decided against the defendant in error, still the decision of the state court upon the non-federal questions in favor of the defendant in error would preclude the entertaining of a writ of error by this court. The decision of the state court must be such that if the federal questions were eliminated there would have been no further ground upon which the state court could have decided the case, and such is not the situation here.

CONCLUSION.

We respectfully ask that the writ of error be dismissed, or if it may be considered to be a course more in harmony with the rules of the court, that the judgment of the Supreme Court of the State of Illinois be affirmed. The object of rules 4 and 5, we apprehend, is to dispose of the case upon motion so as to avoid the expense and delay of requiring a defendant in error to file briefs and arguments before the hearing. Either of the methods of disposing of the case herein suggested will, in our brief, effectuate the purpose of these rules.

Respectfully submitted,

JOHN W. BECKWITH,
Assistant Corporation Counsel,
Attorney for Defendants in Error.

WILLIAM H. SEXTON,
Corporation Counsel,
Of Counsel.

PEOPLE OF THE STATE OF ILLINOIS EX REL. GERSCH, *v.* CITY OF CHICAGO ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 474. Submitted December 16, 1912.—Decided January 6, 1913.

Where the record does not contain the final judgment to which the writ of error is directed this court cannot assume that a judgment was entered and is without authority to exert jurisdiction.

THE facts are stated in the opinion.

Mr. John W. Beckwith and *Mr. W. H. Sexton*, for the defendants in error, in support of motion to dismiss or affirm.

Mr. Allen B. Chilcoat and *Mr. Stephen A. Day*, for the plaintiff in error, in opposition thereto.

Memorandum opinion, by direction of the court, by MR. CHIEF JUSTICE WHITE.

This is a companion case to *Preston* v. *City of Chicago*, No. 195, just disposed of. Unlike the record in the Preston case, however, the record in this case does not contain the final judgment to which the writ of error is directed. As we cannot assume that a judgment was in fact entered in the Supreme Court of Illinois, it results that we are without authority to exert jurisdiction.

Writ of error dismissed.

and to recover double damages. The trade-mark consists of two concentric circles having the words Ginebra de Tres Campanas and the plaintiff's name between them, and in the centre a device of three bells (Tres Campanas) connected at the top by a ribbon and some ears of grain, with the words Extra Superior under the mouth of the bells. The plaintiff's autograph is reproduced across the middle of the circular space and the bells. More detail is unnecessary; but it may be mentioned that the plaintiff claims title under a grant from the Governor General dated December 16, 1898, and that the mark covered by the alleged grant had underneath the circles the word Amberes (Antwerp), indicating imported gin, while that now used has Manila in the same place and is applied to gin made in the Philippines.

It may be assumed that the defendant's design has a deceptive resemblance to the plaintiff's notwithstanding a change from Tres Campanas to Dos Campanas and the substitution of the defendant's autograph for the plaintiff's. And whether the plaintiff has a title to the mark now used or not it also may be assumed that he might recover under the Philippine act of March 6, 1903, No. 166, § 4; Compiled Acts, p. 180, § 58, but for the following facts, on which the defendant had judgment in both courts below.

The plaintiff's trade-mark in its turn closely imitates in most particulars a much earlier and widely known trade-mark of Van Den Bergh & Co., of Antwerp. It is true that in the latter there is but one bell, and that the title correspondingly is Ginebra de la Campana, but the intent to get the benefit of the Van Den Bergh device is too obvious to be doubted. We do not go into the particulars of the different registrations, &c., of this latter, beginning with a Spanish certificate to the Antwerp firm in 1873. For although the plaintiff elaborately argues that under the Spanish regime trade-mark rights could be

acquired only by statutory registered grant; that Van Den Bergh & Co. never acquired any such rights in the Philippines; that if they did they lost them by failing to register or lapse of time, and that he was free to get a registered title as against any certificate of theirs; those questions are immaterial in this case. With or without right the earlier trade-mark was in widespread use and well known, and the obvious intent and necessary effect of imitating it was to steal some of the good will attaching to it and to defraud the public. The courts below found the fraud and that both plaintiff's and defendant's marks were nothing more than variations upon the earlier mark.

In such a case the Philippine act denies the plaintiff's right to recover. Act No. 666, § 9. See § 12, and No. 744, § 4. Compiled Acts, §§ 63, 66. It is said that to apply the rule there laid down would be giving a retrospective effect to § 9 as against the alleged Spanish grant of December 16, 1898, to the plaintiff, contrary to general principles of interpretation and to Article 13 of the Treaty of Paris, April 11, 1899, providing that the rights of property secured by copyrights and patents shall continue to be respected. But the treaty, if applicable, cannot be supposed to have been intended to contravene the principle of § 9, which only codifies common morality and fairness. The section is not retrospective in any sense, for it introduces no new rule. *See Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218. Imposition on the public is not a ground on which the plaintiff can come into court, but it is a very good ground for keeping him out of it. Even if Van Den Bergh & Co. had no registered title and no such other rights under Spanish colonial law as they have under Act No. 666, § 4, the imposition on the public was still there and though not a matter of which the defendant could complain, it was a matter to which he could refer when the plaintiff sought to exclude him from doing just what the plaintiff had done himself. This

certainly would have been our law, and we should assume, if material, that the same doctrine would have prevailed in Spain, in the absence of the clearest proof to the contrary, which we do not find in the record or the brief.

What we have said with reference to the plaintiff's claim under the Treaty applies in substance to his argument that by § 14 of Act No. 166 the Spanish certificate is conclusive evidence of the plaintiff's title. That section must be taken to be subject to general principles of law embodied in other sections to which we have referred.

If there was any claim intended to be put forward on the ground of unfair competition, the prayers of the complaint and the plaintiff's testimony show that such claim depended fundamentally on the alleged infringement of trade-mark. Any matters of fact in dispute were sufficiently disposed of by the concurrent findings of the courts below.

Judgment affirmed.